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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 6, ORIGINAL

THE STATE OF NEBRASKA, COMPLAINANT

v.

THE STATE OF WYOMING, DEFENDANT

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT

THE UNITED STATES OF AMERICA, INTERVENOR

ANSWER BRIEF FOR THE UNITED STATES OF AMERICA, INTERVENOR

PATTERN OF THE BRIEF

In aid of a useful arrangement of materials the United States, in this brief, will first consider the briefs of the other parties separately, stating first its answer to those portions of the Nebraska brief to which it wishes to reply (pp. 2–10, *infra*), then its answer to Wyoming (pp. 10–44, *infra*) and lastly its answer to Colorado (pp. 44–78, *infra*).[1]

[1] The omission herein of an answer to any specific argument or point in any one of the state briefs does not necessarily indicate the agreement of the United States to the

After those separate discussions appears a general correlation of the primary positions taken by all parties on the various issues presented (pp. 79–88, *infra*).

ARGUMENT

I

ANSWER TO NEBRASKA'S BRIEF

Part I of Nebraska's argument (Nebr. Br., pp. 7–24) deals with the actual and threatened damage to the State and proclaims it adequate to justify relief in this litigation. The United States agrees that the facts and the applicable law demonstrate the existence of a justiciable controversy and require the entering of a decree of equitable apportionment. Consequently it does not oppose Nebraska's position in this matter. It believes, however, that the threatened injury to Nebraska from the Kendrick Project is not so certain or so great as is claimed by Nebraska. The Nebraska argument (Br., pp. 17–24) does not give adequate weight to the fact that Kendrick is essentially a storage water project and one with storage capacity adequate to care for its needs for a series of dry years if that capacity is

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position taken by the other party. Some arguments are unanswered as a result of judgment concerning their relative importance and a desire to eliminate controversy on as many issues as possible.

filled at the beginning of the period (report, pp. 141–143[1]).[2]

A. There is no Occasion to Allow, Allocate or Apportion Water in the Stream Above the Tri-State Dam for the Use of Any Canals Below that Dam

In Part V of its brief (pp. 47–54), Nebraska urges that canals heading between the Tri-State Dam and Bridgeport, Nebraska, should be included with those in the Whalen to Tri-State Dam section in the apportionment of water at or below Whalen.

The relationship in priority between the canals below the Tri-State Dam and those above, discussed at some length by Nebraska, is immaterial to the question whether they do or do not have an adequate supply of water from local sources, as the Special Master found that they did (report, pp. 9, 92–96). Likewise, the fact that those canals lie between the Interstate, Northport and Ft. Laramie canals, on the one hand, and the river on the other hand (Nebr. brief, pp. 51–52) is immaterial except to show the source of the return flow water which becomes available as a local supply to meet the needs of those canals.

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[1] References to "report" or "the report" refer to the report of the Special Master filed in this case.

[2] The United States, however, has not objected and does not object to the Special Master's recommended inclusion of limitations on the storage and diversion of water (other than return flow) for the Kendrick Project as a part of an appropriate, equitable distribution.

As conceded at page 52 of the Nebraska brief, the only question is as to the adequacy of the local supply to meet the requirements of the canals below Tri-State. To disprove the Special Master's conclusion that the local supply is adequate, Nebraska offers only one possibly significant argument: that canals in that area historically were short of water during July and August of the years 1934, 1936 and 1940 as shown in Table III on page 53 of Nebraska's brief. The data in that table comes from the Nebraska Biennial Reports of which Nebraska asks the Court to take judicial notice, and the data relates only to four canals of the twelve in the area. From the same source materials, the Nebraska Biennial Reports, we submit here a parallel table showing similar data for four other canals in the area, including the Enterprise and Winters Creek which are the furthest upstream and the water taken by which would otherwise have been available for any other canal below. The table also shows the flow at Bridgeport of water passing out of that area unused.

Values other than percentages are in acre-feet

Canal	80% of Master's Requirement (p. 98)	1934		1936		1940	
		July-Aug. Diversions	%	July-Aug. Diversions	%	July-Aug. Diversions	%
Enterprise	7,250	11,608	160	13,000	180	9,980	138
Winters Creek	5,150	6,851	133	7,080	137	7,020	137
Minidoka	8,970	7,276	81	8,770	169	8,351	162
Castle Rock	7,200	8,884	127	9,010	115	6,005	80
Flow at Bridgeport		13,410		64,280		32,450	

In view of the data in the above table and without reference to other weaknesses of the Nebraska argument, certainly it cannot be said that Nebraska has shown any basis for a conclusion that the local supply below the Tri-State Dam is inadequate or, and even more clearly, that there is basis for overthrowing the Special Master's contrary conclusion arrived at on consideration of obviously pertinent evidence (report, pp. 92–96).

B. *There is No Occasion for Protecting North Platte Project Canals Against the Kendrick Project in the Special Master's Recommendations III and IV*

Part VI, C (pp. 67–69) of the Nebraska brief urges the inclusion of the North Platte Project canals in recommendations III and IV (report, pp. 177–178) among the canals and reservoirs to be protected against out-of-priority operation of the Kendrick Project.

It seems obvious that the Special Master purposely omitted those North Platte Project canals since their inclusion is unnecessary in view of his conclusion that existing contracts between the United States and its water users preclude operation of the Kendrick Project except in recognition of prior rights in the North Platte Project (report, pp. 140–144), a conclusion which the United States does not controvert (U. S. brief, p. 207).

The United States' proposal for joint operation of the Seminoe and Pathfinder reservoirs does not render necessary the subordination in the decree of Kendrick to the North Platte Project canals, as suggested at page 68 of the Nebraska brief. As appears from part VIII (pp. 207–209) of the United States' brief, the proposal for joint operation is conditioned on renegotiation of existing contracts wherein, of course, the North Platte Project water users would protect themselves to whatever extent is necessary. Furthermore, inclusion in the decree of the provision sought by Nebraska would forever preclude the possibility of joint operation under renegotiated contracts, the desirability of which is indicated at pages 207–209 of the United States' brief.

C. *None of the Nebraska Canals Are Shown To Be Entitled to Any Greater Allotment of Water than that Found by the Special Master To Be Proper*

In part IX of its brief (pp. 77–85) Nebraska contends for greater allocation of water to Nebraska canals with particular attention to the Tri-State, Winters Creek and Central canals. As to all of its canals, however, Nebraska suggests that a flat seven per cent increase is in order since, on Nebraska's analysis of the requirements of canals above Whalen, it appears that the Special Master has allowed about a seven per cent increase over actual requirements.

This suggestion is unsound for several reasons. First, it is not demonstrated that the Nebraska allowances are less accurate than those for canals above Whalen.* Second, it is not even stated that the Nebraska allowances in the Whalen to Tri-State Dam section are on any different basis than allowances to other canals in that section. Third, in view of the claimed overappropriation of the natural flow of the stream (Nebr. Br., pp. 9–11), which undoubtedly is correctly claimed, it is hardly appropriate to equitable apportionment to increase allowances to some because of asserted liberality to others, rather than to cut down allowances to all to their proper basis. Fourth, the record is the obvious basis of determining the correctness or incorrectness of the Special Master's conclusions, but it is not adverted to in substantiation of this suggestion.

1. The Tri-State Canal is not shown to have any specific right to a larger allocation of water

Nebraska presents only two specific grounds for claiming a right to a larger allocation for the Tri-State Canal (Nebr. Br., pp. 77–83): (1) that the Special Master failed to take account of about 3,000 acres of "preferred right" land not included in the Farmers Irrigation District; and (2) that

*In his report the Special Master indicates that, on the basis of conflicting evidence before him, he considers his allowances for the various Nebraska canals to be liberal. He has at least undertaken to apply the same rule of liberality in all sections of the river.

the United States, and "projects in which it is interested," are estopped to question the right of the Farmers Irrigation District to water for the irrigation of 60,000 acres.

The first ground, as stated above and as stated in the Nebraska brief, is obviated by Nebraska's own statement, which is correct, that the preferred rights, "of course, are included in the Master's total estimate of acreage of 52,300 acres, being 51,000 acres under the 1887 priority and 1,300 under the 1902 priority (see Master's report, p. 243)." Nebr. Br., p. 80. The real argument made here by Nebraska is that the Tri-State's Warren Act contract is for 180,000 acre feet; that that excludes the water to which the "preferred right" lands are entitled which, when added to the Warren Act contract amount, makes a total of at least 190,500 acre feet; that at least that amount must be allocated to the Tri-State Canal else the actual effect of the Warren Act contract will be interfered with; and that the Special Master intended no such interference. Nebr. Br., pp. 80-81.

In point of fact the Special Master *did* intend to make allocations less than Warren Act contract amounts where he found that justified. That is perfectly apparent from pages 189-190 of his report. Nor was there any reason why he should not do so since he is working toward an-

appertionment of *natural flow only* (report, pp. 10, 69). The contracts, requiring the supplementation of natural flow by storage, are unaffected.

The second specific ground for increase of the Tri-State allotment refers to an estoppel against the United States "and the projects in which it is interested," meaning, apparently, the various units of the North Platte Project and, perhaps, the Kendrick Project. The estoppel is said to arise from the decision in *United States* v. *Tilley*, 124 F. 2d 850, certiorari denied, *sub nom. Scott* v. *United States*, 316 U. S. 691. First it may be pointed out that estoppel against the United States or its projects is not estoppel against all of the interests involved in this litigation. Secondly, it must be recognized that there is, actually, no possible ground of estoppel against anyone. The *Tilley* decision was not concerned with determination of the actual acreage irrigated and the finding of fact in the District Court to which Nebraska refers on page 82 of her brief was actually a mere recitation that, "It was stipulated by Plaintiff and the District that *for the purpose of this suit* the District contains"[1] about 60,000 acres and serves about 3,000 acres more under preferred rights. That is far from a basis of estoppel here.

[1] Nebr. Appendix, p. 157. Emphasis added.

2. The Winters Creek and Central canals are entitled to no greater recognition than given by the Special Master

These two canals head below the Tri-State Dam and, the United States submits, are not entitled to consideration in the allocation of water to Nebraska for the reasons set out in section A, above. Furthermore, Nebraska's claim for recognition of a larger requirement for them (Nebr. Br., pp. 84–85) is solely on the ground that they should have a seven percent increase to balance their treatment with that of canals above Whalen, a ground shown to be without foundation in the introductory discussion of this section of this brief.

II

ANSWER TO WYOMING'S BRIEF

The principal burden of Wyoming's brief is to change entirely the Special Master's method of allocation or apportionment of water for the Kendrick Project and in the Whalen to Tri-State Dam section of the river. Nebraska and the United States each urge a change in the recommended method of distribution in the below-Whalen area, advocating a priority schedule for distribution rather than the flat percentage apportionment adopted by the Special Master (Nebr. Br., pp. 40–47; U. S. Br., pp. 183–193). Those requested changes, however, go to a detail, albeit an important one, in the Special Master's over-

all scheme of apportionment. But Wyoming's proposal, involving so-called mass allocation of seasonal supplies in acre feet, goes to the very basis of the scheme of apportionment itself. Wyoming has presented the foundations for its proposal and the proposal itself element by element in the various sections of its brief. Each will be discussed in order in this brief.

A. *The Wyoming Analysis of the Water Supply Is Based on Misapplication of the Principles Announced in Wyoming v. Colorado*

At pages 10–31 of its brief Wyoming analyzes the water supply, not merely for the purpose of determining the adequacy or inadequacy of the supply and of having a basis to determine how apportionment will work, as did the Special Master, but also and primarily for the purpose of determining the amount of water available seasonally for division between the parties on the basis of a specified number of acre feet per season to each of them interested in the Kendrick Project and the Whalen to Tri-State Dam section.[4] *Cf.* Wyo. Br., pp. 83, 85–86. Wyoming is measuring the water supply so that each party can be given a share of a determined size, not only of that supply which is measured, but of all supplies that

[4] The United States, of course, takes the position that if any such "mass allocation" should be made the United States should be included and receive allocation for its projects. *Cf.* U. S. Br., pp. 30–177, 183–193.

may hereafter be available. The question, then, of course is whether there is adequate assurance that the future supplies will be as large or larger than the one which is measured.

In its measurement of the water supply Wyoming concludes that it is adequate to meet all requirements as found by the Special Master. In doing so, reliance apparently is placed only on two basic principles: (1) That the entire period of recorded flows must be relied on to determine the supply rather than the period of recent low flows so much emphasized by the Special Master (report, pp. 10, 119–123); and (2) that the total supply, both from storage and natural flow should be taken into account in determining the supply available for apportionment. *Wyoming* v. *Colorado*, 259 U. S. 419, is the sole authority relied on in each instance.

1. The Special Master did not err in designating the period since 1930 as the truest guide to water supply

In *Wyoming* v. *Colorado*, 259 U. S. 419, 471–472, the Court stated that the average historical supply over a period of years is not to be taken as a proper measure of the water supply because of great variations in flow (which are amply evidenced here also—report, p. 25); "to be available in a practical sense, the supply must be fairly continuous and dependable", although the Court

recognized that the flow may be equalized within limits by reservoir construction or operation. "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years." 259 U. S. 476. The testimony of a particular witness was criticised because "based too much on the average flow, and not enough on the unalterable need for a supply which is fairly constant and dependable, or is susceptible of being made so by storage and conservation within practicable limits," the Court stating that, although some deficiency may be permissible, a supply is not adequate if it is likely to be intermittent or materially deficient at relatively short intervals; "substantial stability in the supply is essential to successful reclamation and irrigation." 259 U. S. 480. Thereafter the Court determined the dependable supply, eliminating a year of particularly high run-off from its consideration of the historical data, and fixing the dependable supply above the lowest historical run-offs within limits which it believed might permit of substantial equalization of flows by reservoir operation. 259 U. S. 484–486.

Mere examination of the graph on page 25 of the Special Master's report, showing run-off (natural flow) at Pathfinder from 1904 to 1943, inclusive, indicates conclusively that the various tests laid down in *Wyoming* v. *Colorado* cannot

be met except by focusing attention on the period since 1930. In that 14-year period only two years reached or exceeded the 1904–1940 average flow and only one year reached the 1904–1930 average flow; five years were approximately one-half or less of the 1904–1940 average flow; and the average flow of the 14-year period itself (computed from data on pages 23–25 of the report) was only 945,270 acre feet, approximately 370,000 acre feet less than the 1904–1940 average and over 500,000 acre feet less than the 1904–1930 average. Furthermore, that 14-year average covers more than one-third of the entire period of record at Pathfinder.[1] In the language of the Court in *Wyoming* v. *Colorado,* certainly only the 1930–1943 supply can be said to be fairly continuous and dependable, and certainly the long-time average can not be said to be fairly continuous and dependable. No crops could have endured over that 14-year period on the recollections of the flows prior to 1930; and any flow for a period longer than the 1930–1943 period must be said to be "intermittent or materially deficient at relatively short intervals," the intervals of deficiency since 1930 being interrupted only in two years (1932 and 1938) of the fourteen. Actually the principles on which

[1] Flows at Pathfinder from 1895 to 1904 have been estimated (see Wyo. Br., pp. 25–26), providing an additional nine-year period of apparently relatively large run-off. The period from 1930 on, however, is appreciably more than one-fourth of the total 1895–1943 period.

the supply was determined in *Wyoming* v. *Colorado* might well require elimination of the high flows of 1932 and 1938 and the determination here of supply on only the 1930–1943 data excluding those years.

It is obvious, of course, that the extent of reservoir construction which the Court contemplated as appropriate and proper to smooth out uneven flows was not of a type to carry over water from 1930 or even 1933 (when the Nelson study showed that there would have been the last spill from reservoirs under the controlling principles of that study—Wyo. Br., p. 27) until some unknown time after 1943. The Court spoke in terms of carry-over for one year (259 U. S. 472) and of a storage capacity of 146,655 acre feet on the Cache la Poudre River, "with the high state of irrigation development in that valley" where the long-time average run-off was 297,322 acre feet (259 U. S. 474–475), a storage capacity of about 50 per cent of average run-off. In the North Platte Valley above Tri-State the United States has constructed reservoirs with a capacity of 175% of long-time average run-off. Report, p. 36. Certainly we here have storage capacity in excess of the practicable limits contemplated in *Wyoming* v. *Colorado*.

Unless, then, that storage capacity is seen to be capable of providing all the water needed since 1930, it must necessarily follow that the period

since 1930 offers the truest guide to dependable water supply and the principal measure of the supply to be divided under Wyoming's "mass allocation" theory.* If the supply is not large enough to provide the requisite shares, then some method of allocation of shares other than "mass allocation" of fixed quantities must be used.

At pages 19–27 of its brief Wyoming undertakes to demonstrate by reliance on the Nelson study and reference to the Dibble study that the reservoirs were capable of equalizing flows to such an extent as to meet the requirements, found by the Special Master, for the period subsequent to 1930. First, however, it should be noted that both the Nelson and Dibble studies were predicated on the historical fact that run-offs immediately preceding 1930 were unusually large and took the reservoirs into the 1930 period substantially full in those studies. See table of spills on page 27, Wyo. Br. Whether such a situation will repeat itself in the future is, of course, debatable in view of the history since 1930.

Also it must be borne in mind that the Nelson and Dibble studies showed a supply adequate, with ideal administration, only to or through 1940, the last year available for consideration at the time of preparation of the studies. Report, pp.

*It also, of course, supports the Special Master's use of the post-1930 period as a basis for his determination that an affirmative decree should be entered apportioning the supply and as a basis for the apportionment.

66-67. By reference to Wyo. Ex. 176 (Wyo. Appendix, pp. 3-20) it will be seen that the Nelson study had only a 169,300 acre-foot carry-over at the end of 1940, far smaller than that at the end of any preceding year in the post-1930 period, and the result of a rapid depletion of storage during 1940. The reservoirs had, then, substantially exhausted their ability to carry over the pre-1930 excesses and counterbalance the low flows of the post-1930 period. But those low flows did not stop in 1940; 1941-1943 have been far below the 1904-1940 average. Report, page 25. Consequently the Court cannot now properly assume the adequacy of the reservoir system to neutralize low flows comparable with those of the fourteen years of record since 1929.

Furthermore, the Wyoming argument lays considerable stress on the fact that the Kendrick Project can be taken care of for seven years solely from storage in its reservoirs. Wyo. Br., pp. 15, 29-30. Passing the point that that argument assumes the reservoirs to be full at the outset of the seven-year period, several matters should be noted. Most of the capacity of the Alcova Reservoir is dead storage so far as Kendrick is concerned; it cannot be diverted into the canal system of the project. Tr. 15262-15263 (Appendix V to U. S. Br.). Also, the seven-year supply for Kendrick, as appears from the computation on page 15 of the Wyoming brief, is found only by

giving credit to the project for its return flow. In practical operation to give that credit means that diversion of substitute water must be permitted. The Special Master denies that right (Report, recommendation 5, pp. 178–179), to which the United States excepts in part (U. S. Br., pp. 209, 212–215) but to which Wyoming does not except (Wyo. Br., pp. 77–80). Also, Wyoming, in its argument, uses this return flow twice. It is used to prove a seven-year supply for Kendrick, as just pointed out, and also used to increase downstream supplies. Wyo. Br., pp. 29–30. Consequently, it seems clear that either the Kendrick Project cannot use this water and therefore does not have a seven-year supply (or less, counting out the Alcova dead storage), or else that return flow does not augment downstream supplies as Wyoming argues.

Still one additional fact should be mentioned regarding Wyoming's analysis of the adequacy of the supply. Reliance is placed on the Nelson study to show that the Special Master's requirements can be met, it being pointed out that the Nelson study assumed all present uses above Whalen (excluding Kendrick) to have been supplied as they were historically. Wyo. Br., pp. 20, 23 (point 1). But the Special Master allows additional uses above Whalen in his recommendations (to which Wyoming does not except). Report, pp. 133, footnote 1, (as to Colorado), 135

(as to Wyoming above Pathfinder), 146, 148, footnote 1, (as to Pathfinder to Whalen section).

In all of the circumstances it seems that there is no adequate basis for assuming that, under the proposed apportionment, the reservoirs can equalize the supply to meet all requirements. The contrary conclusion is impelled. Wyoming has not shown an adequate supply, even with reservoir regulation.*

2. The total supply, storage water and natural flow, cannot properly be taken into account as a basis of equitable apportionment among the states

Despite the analysis just made, the United States also contends that, under the doctrine of *Wyoming* v. *Colorado*, or otherwise, the storage water cannot be taken into account in determining the supply to be apportioned among the states.

In the first place, the United States contends that it owns all project water. U. S. Br., pp. 30–117. Whether or not it owns project natural flow, clearly it owns the storage water under Wyoming law (U. S. Br., p. 174), and there is no question raised as to its ownership of the storage

* The argument on pages 27–29 of the Wyoming brief, based on Table III, page 67, of the Special Master's report, clearly does not itself prove the ability of the reservoirs to equalize the variations in supply available in the Whalen to Tri-State Dam section. Also, the Special Master's table on which that argument is predicated is not accurate. U. S. Exception XXII; U. S. Br., pp. 221–223.

facilities. Its use of those facilities and its disposition of that water is controlled by federal law. Consequently, those facilities and that water cannot be said to be available to the *states* to equalize natural flows within the sense of *Wyoming* v. *Colorado*.[10] That case, as its rationale clearly shows, addressed itself only to a situation where the states involved had opportunity to control reservoir facilities to equalize the uneven flow of water in its natural state.

Furthermore, it certainly cannot be argued that water users, such as those under the Mitchell Canal in Nebraska, who have no contract right to receive storage water from government reservoirs, can participate in the storage water of a low natural flow year or season, or participate in the benefits of the equalization of flows created by the storage of large flows and subsequent discharge of the storage water. And, since the United States owns those storage facilities as well as the storage water, the states cannot provide means for such users to participate hereafter.[11] Consequently, those storage works and their effect on total supplies of water cannot be taken into account in determining the supplies available for apportionment among the states, and that is so whether or

[10] The right of the United States, through the Bureau of Reclamation, to operate these reservoirs apparently is conceded by Wyoming. Wyo. Br., pp. 66, 86.

[11] That the United States could or even may is entirely immaterial to this point.

not the United States is granted a separate apportionment."

Wyoming v. *Colorado* is inapplicable to this point, we believe, on another score also. The storage facilities involved there were to serve lands only in one of the two litigant states. Consequently the Court could and did look to the ability of the individual state to provide facilities to equalize flows and make them more dependable and usable. Here, however, the facilities are in an upper, not the lower, state and affect the supply of water in *both* Wyoming and Nebraska. Assuming for the argument, that the states rather than the United States control those facilities, Nebraska cannot exercise control over storage in Wyoming, as Wyoming could over its own storage in *Wyoming* v. *Colorado*.

In these circumstances, then, Wyoming errs in considering total supply, natural flow and storage, in determining the supply available as a basis for apportionment.

B. *The Wyoming Argument for "Mass Allocation" (Part 2 of Its Brief) Is Not Sound*

The Wyoming argument (part 2) at pages 31–40 of its brief is aimed at demonstrating the

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[11] The Special Master, of course, eliminates storage water from his actual apportionment. Report, pp. 10 (paragraph 9), 69. The reasons for that are, we believe, obviously sound and unanswered by Wyoming's argument. See sections C and D of this part of this brief, *infra*, pp. 25–33.

propriety of the concept of "mass allocation" for application here. That demonstration, as is apparent from the argument on pages 37–38, is dependent on the existence of a supply adequate to meet the full needs of the Kendrick Project and the Whalen to Tri-State Dam section of the River. The inadequacy of that supply for purposes of mass allocation has, we believe, been demonstrated in the preceding subsection of this brief.[18] The argument for mass allocation must fall as a result of that demonstration. Several other matters will be mentioned briefly, however.

The United States does not disagree with Wyoming's contentions here as to what was done in *Wyoming* v. *Colorado* (Wyo. Br., pp. 31–33) or what was said in *Connecticut* v. *Massachusetts*, 282 U. S. 660, (Wyo., Br., pp. 39–40). It is submitted, however, that those cases do not *require* "mass allocation"; they merely permit it if the circumstances are proper. That "mass allocation" is not legally required follows from the discussion of authorities at pages 189–192 of the United States' opening brief, where we believe it is adequately demonstrated that the rights of individual canals or projects may be directly affected and their exercise controlled by a decree in

[18] That demonstration includes a showing that the Special Master allows more than present uses above Whalen (compare Wyo. Br., p. 38) and that 208,000 acre feet are the annual requirement for Kendrick as appears in Wyo. Br., p. 15, rather than the 168,000 acre feet used on Wyo. Br., p. 37 (where the evaporation factor is omitted).

a case such as this where the equitable rights of the parties dictate such a course.

The fact that the equitable rights of the parties require such a course, *when the supply is not adequate to meet all needs,* is apparent from the discussion and facts at pages 137–143, 148–164 of the Special Master's report and from the brief analysis at pages 186–188 of the United States' opening brief. In this connection it should be noted that paragraph 6 of Wyoming's proposed decree (Wyo. Br., p. 84), explained at pages 91–96 of its brief, contemplates the possibility of shortage of supply and proposes that shortages be divided between Nebraska and Wyoming in proportion to the respective allotments to those states. Such distribution of a short supply, of course, merely constitutes another percentage formula for division of the supply, different from the 75-25 formula recommended by the Special Master, including the Kendrick Project as a portion of the Wyoming requirement to be taken into account in fixing the formula. The equities of the new formula, in terms of prior rights as among the states, is not demonstrated anywhere in Wyoing's brief, although it is apparent that the formula gives to Wyoming (not necessarily to the Kendrick Project under Wyoming intra-state administration) the benefit of a supply figured in large part on the needs of the newest project on the river, the Kendrick. It is also apparent that it forces a diminution of supply to the Kendrick

Project and to the Whalen to Tri-State Dam diversions when no diminution is contemplated for the intervening diversions (between Pathfinder and Whalen) which are not included in the mass allocation subject to this treatment. Neither of those situations is equitable. Nor is any straight percentage formula of apportionment equitable. U. S. Br., pp. 183–188. *Wyoming* v. *Colorado, supra,* of course, does not set up any such basis of allocation; it allocates a fixed amount of water only, and it emphasizes the necessity in a case such as this of making the allocation fit the priority rights of the parties, which Wyoming's proposed treatment of an insufficient supply does not.[14]

[14] Paragraph 6 of Wyoming's proposed decree (Wyo. Br., p. 84) provides for prorating deficiencies only. It allows no uses of excesses except if they result in spills from the reservoirs. See explanation at page 95 of the Wyoming brief. This means that in years of unusually high need for water as a result of climatic conditions no excess water, natural flow or storage, may be used; the permissible uses are limited to the requirements found by the Special Master, which are necessarily *average* requirements. The variation from average can be downward only. Since Wyoming's proposal covers natural flow and storage water alike, as the Special Master's does not, this means that project water users would be denied their contract right to use storage water in time of unusual need up to the limits of beneficial use and Warren Act contractors would be denied their right to additional water in such periods within the limits of their contracts where the contract amounts exceed the Special Master's determined requirement (report, p. 190). Those contracting parties are not parties to this litigation and their rights cannot be affected herein. But if those contract rights be allowed to

C. *The Segregation of Natural Flow and Storage Water is Feasible*

At pages 40–47 of its brief (part 3 of the argument), Wyoming opposes the segregation of natural flow water and storage water which is embodied in the Special Master's conclusions and recommendations (report, paragraph 9 on p. 10, pp. 69, 177–179). And so it must in support of its proposed "mass allocation," which contemplates allocation of the entire water supply, natural flow and storage alike. Clearly there is a wholly inadequate and undependable supply of natural flow (report, pp. 71–72), which alone is not susceptible to application of the Wyoming principle of "mass allocation", and Wyoming nowhere contends to the contrary.

The Wyoming argument at this point is directed wholly toward the practical feasibility of accomplishing the segregation in administration of the stream. The United States believes that segregation is legally required and that the Wyoming proposal for mass allocation of storage water as well as natural flow must therefore fail. Since, however, the Special Master recommends and both Nebraska and the United States propose apportionment based on segregation, brief reference

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operate within the general water allocations proposed by Wyoming, then in those years of above-average need the non-storage right users would get proportionately less water irrespective of whether there was natural flow otherwise available for them—an obviously inequitable result.

will be made to Wyoming's argument based on feasibility, for the Court should not be asked to make an apportionment based on segregation if that be impossible of administrative accomplishment.

The quotations from the Special Master's report, on page 41 of the Wyoming brief, are not findings that natural flow and storage water cannot be segregated, as Wyoming says they are. By their clear terms, as well as by the full context in which they appear, they are merely statements that the evidence in the record is not complete as to the exact natural flow quantities in the Whalen to Tri-State section. Nowhere is there a finding that the natural flow cannot be segregated from storage water in a manner adequate for administration of the supply on a segregation basis. Obviously they have been segregated in the past. Tr., pp. 27980–27981 in Wyo. Appendix, pp. 43–44. It may be conceded, as Wyoming points out, that there has been difficulty and some disagreement in the past among the parties as to the exact correctness of the segregation. U. S. Exhibit 204–A (Wyo. Appendix, pp. 66–70) shows a formula proposed and used in 1940 and 1941, which is recommended by the Special Master for adoption until the interested parties may agree on some other one (report, pp. 69, 179). Contrary to Wyoming's assertion (Wyo. Br., pp. 43, 44), that formula was in use in 1941, the last year to which

the evidence is directed. Tr., pp. 27985, 28005–28006 in Wyo. Appendix, pp. 46, 58. As the exhibit itself shows, it has been accepted by the Wyoming State Engineer. U. S. Ex. 204–A, sheet 6, in Wyo. Appendix, p. 70. And as the Special Master points out, that formula is acceptable to Nebraska. Report, p. 69.

It is true (*cf.* Wyo. Br., pp. 42–43) that the formula of U. S. Exhibit 204–A does not cover the question of time lag in the movement of water from Pathfinder to Whalen and therefore does not cover one element necessary in the segregation of natural flow and storage at Whalen. But that does not constitute so serious a problem as Wyoming indicates. True it is that Mr. Gleason testified that the use of an arbitrary 3-day time lag element may cause errors in computation up to 1000 second feet at a given point of time at Whalen (Wyo. Br., pp. 43, 45), but he also pointed out that corrections can be and are made to adjust that so that over a short period of days the segregation is balanced (admitting, however, that there is basis for disagreement on the method of adjustment). Tr. pp, 28000–28004 in Wyo. Appendix, pp. 54–57. The witness testified that the segregation could be made and is made on a basis adequate for administrative purposes. Tr., pp. 28028–28029 in Wyo. Appendix, pp. 65–66. Furthermore, the witness did *not* testify that the U. S. Ex. 204–A formula had to be abandoned be-

caus[illegible] would have heavily penalized direct flow users. *Cf.* Wyo. Br., pp. 43, 45. By comparison of the related testimony of the witness at pages 27985–27986, in Wyo. Appendix at page 46, and page 28008, in Wyo. Appendix at pages 59–60, it is clear that the formula which would have heavily penalized direct flow users in 1941 was the substituted simple formula used at the end of the 1940 season because of unusual conditions, and that to avoid that penalty there was a return in 1941 to the formula of U. S. Ex. 204–A.

There is, then, no reason to conclude that the segregation of storage water and natural flow cannot be adequately accomplished. The difficulties have not prevented segregation, albeit with inaccuracies, in the past, and the difficulties are shown to be greatly lessened by the adoption of the formula in U. S. Ex. 204–A.[15]

D. *Storage Water May Not Be Apportioned in this Proceeding*

In section 4 of its argument (Br., pp. 47–57) Wyoming urges that storage water, as well as natural flow, may properly and legally be apportioned. In doing so it takes issue with the conclusions of the Special Master quoted on page 48 of its brief, the most definitive of which is from

[15] The fact that the project and Warren Act contracts do not require segregation, as pointed out at pages 45–46 of the Wyoming brief, is of no significance. Segregation is unnecessary for canals having storage rights. But not all canals to be affected by this apportionment have such rights.

page 69 of the report where the Special Master concludes that:

> The obligation and necessity of performance of these contracts must be recognized by the decree. The only water subject to allocation therefore is the natural flow. In such allocation, however, the storage water available may bear upon the equities of the States, although it would have no bearing upon the legal rights of individual appropriators as between each other under the law of either Wyoming or Nebraska.

The quotations in Wyoming's brief do not include the last sentence of the above quotation, nor does Wyoming's argument recognize the significance of it as is evidenced by reliance again on *Wyoming* v. *Colorado,* 259 U. S. 419 (Wyo. Br., p. 55) as justifying apportionment of storage water. *Wyoming* v. *Colorado* did not apportion or allocate storage water; it apportioned and allocated *only natural flow* by limiting the amount of natural flow which Colorado could use annually. The effects of storage in equalizing natural flow *in Wyoming* were taken into account in determining the equities of the states, but the use or distribution of stored water was neither controlled nor apportioned. That points up the precise distinction which the Special Master makes here.

It seems clear that the Court cannot apportion or allocate the storage water itself. All of that water is disposed of under the contracts with

project water users and Warren Act contract canals, as conceded by Wyoming on page 48 of its brief. Those contracts are not under attack here and the parties to them, other than the United States, are not parties to this litigation. No state and no water users within a state are entitled to the use of storage facilities or the storage water made available by that use unless they contract for that use with the owner of the facilities. Wyoming itself recognizes and protects that principle, even requiring its administrative officials to segregate storage water and natural flow in streams and to secure the delivery of storage water only to those entitled to it by proper arrangements with the reservoir owner. Wyo. Rev. Stats. (1931), secs. 122–1504, 122–1508, 122–1602; see *Scherck* v. *Nichols*, 55 Wyo. 4 (1939).[18]

Wyoming poses the question, "Is it possible that the Constitutional powers of this Court may be diminished because of private contract?" and answers it, "We think not". Wyo. Br., p. 48. Undoubtedly the Court can, as it did in *Wyoming* v. *Colorado*, determine the amount of water to which a state is entitled and thereby limit the

[18] In view of this Wyoming law, Wyoming can hardly object either to the legality or feasibility of segregating storage and natural flow water. And, in view of that Wyoming law and substantially similar Nebraska law (Nebraska Rev. Stats. (1943), sec. 46–273), segregation is appropriate here. *Cf. Wyoming* v. *Colorado*, 259 U. S. 419, 466–467.

amount of water available for storage in reservoirs and in doing so may consider the possible effect of storage on the dependable, usable supply. With the exercise of that power, the existence of the storage water contracts does not interfere. But that is far from the power actually to apportion the storage water itself with the necessarily attendant control of the use of the storage facilities or reservoirs and the water stored in them, which are property owned and controlled privately under the law of Wyoming (which represents the minimum status of the rights of the United States as owner of these particular reservoirs—see page 174 of the United States' brief) and the use of which is already fixed by valid contracts."

From what has already been said it is apparent that any failure to segregate natural flow and storage will operate in times of shortage of the whole supply to deprive storage water contractors of the use of a portion of the storage supply for which they pay, and that it will operate at all times to give to those who have not contracted for storage water a substantial increment to the grossly inadequate natural flow supply, which

" This distinction also distinguishes the situation in which the Court may, in a case such as this, fix the rights of individual natural flow appropriators who are not parties to the litigation, as developed at pages 189–193 of the United States' brief. That latter power would extend to the fixing of the right to store water, but not to the fixing of the right to use or dispose of the water stored.

increment is entirely storage water contracted for and paid for by others. There is basis neither in law nor in the equitable considerations which control apportionment for the incorporation of such a principle in the decree to be entered here.

There is nothing of additional weight in the concept, urged by Wyoming at pages 49–51 of its brief, that the operation of the reservoirs is under state law.[18] Assuming that to be so, the state law requires segregation of natural flow and storage water and requires protection of contract rights as to the latter, as indicated above.

Nor is it presently significant that the Reclamation Act and the contracts prescribe beneficial use as the basis and measure of the right to use water (Wyo. Br., pp. 51–56). If Wyoming or its water users feel that those statutory or contractual provisions are not being properly enforced, to their injury, the remedy lies elsewhere than in this suit. Aside from that, however, the data on pages 53–57 of the Wyoming brief is not conclusive as to the presence or absence of beneficial use in the past. As has heretofore been pointed out, the Special Master's requirements are average requirements, and they form the yardstick for the Wyoming data. But the actual need for water varies from season to season

[18] The United States, of course, disagrees emphatically with that concept, as to its reservoirs, and with the interpretation given to the authorities cited. U. S. Br., pp. 30–177.

depending on climatic conditions. One of the clearly and well recognized functions of a reservoir system is to hold over water from seasons when it is not needed for use in seasons when it is needed. The reservoirs not only equalize flows; they also compensate for the effect of climatic irregularities on the need for water. Wyoming's data at this point and Wyoming's proposal for mass allocation of fixed amounts of natural flow *and* storage, completely eliminate that valuable function of reservoirs and storage water, and propose to deny to the storage water contractors that additional, valuable right which otherwise is theirs under their contracts.[19]

From all that has been said it is evident that, in times of shortage of total supply and in times of adequacy of that supply, the Wyoming proposal involves exceedingly important interference with storage water contract rights, contrary to the assertions at pages 52, 54 of its brief.

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[19] That more storage water has gone to lands in Nebraska than to lands in Wyoming, as indicated by data submitted at pages 55–57 of the Wyoming brief, is, of course, the result merely of the fact that more water users in Nebraska have contracted and are paying for storage. That hardly gives rise to a claim of inequitable distribution as between the states. And the reason for it seems apparent from a glance at Table XV on page 81 of the Special Master's report, where it appears that the non-storage right Wyoming canals below Whalen diverted an average of 122 per cent of their determined requirement in the irrigation seasons of the low flow period 1931–1940.

E. *The Decree Should Not Permanently Prohibit Joint Operation of Government Storage Reservoirs*

The position of the United States on this point is set out at pages 207–209 of its opening brief and differs from Wyoming's proposal only in that it concedes that renegotiation of storage contracts is a prerequisite to joint operation. The United States, however, wishes to note succinctly its disagreement with portions of the Wyoming argument on this point (Wyo. Br., part 5, pp. 57–60).

U. S. Exhibit 265 (Wyo. Appendix, pp. 71–74) is a plan of reservoir operation approved and therefore presently prescribed by the Secretary of the Interior. It is, however, not necessarily a plan of joint operation, as Wyoming suggests (Wyo., Br., pp. 57, 60). It does contemplate storage in Seminoe of water which may rightly belong to Pathfinder on a priority basis, for the purpose of generation of power. That is done in the interest of making the greatest overall use of the water available, and the Special Master recommends that such action be permitted as long as it does not interfere with irrigation use priorities (report, pp. 145, 178). In whichever reservoir it happens physically to be, the water of Pathfinder and Seminoe reservoirs on a priority basis can and, under the Special Master's recommendations must, be separately accounted for. The first 1,045,000 acre feet (report, p. 31) available for

storage and stored in either Pathfinder or Seminoe is Pathfinder water. Any over that is Seminoe water."[39]

F. *The Proposed Mass Allocation for the Kendrick Project Is Not Justified*

In part 6 of its brief (pp. 60–67) Wyoming develops the requirement of the Kendrick Project and presents justification for the inclusion of it in the proposed mass allocation based on the long-time sufficiency of the over-all supply. That question of sufficiency of supply has already been discussed by Wyoming in part 1 of its brief and has been criticized in subsection A of this section of this brief (pp. 11–21, *supra*). The basic principles developed there are equally applicable here. Several features of the data included at this point in the Wyoming brief may, however, be briefly mentioned.

The future average accretions, Pathfinder to Whalen, will not be 141,000 acre feet as they were historically (Wyo. Br., pp. 61–62), even if we indulge the disproven assumption that the 37-year historical period began to repeat itself in 1941, for there is a 10,000 acre-foot deduction to be made to correct for present conditions of irrigation development in this area, Tr., p. 27534

[39] This problem is engineeringly simple and, so far as counsel know, that fact has not been questioned until Wyoming's present brief (p. 58). Proof of Wyoming's affirmative position on that matter would, in the circumstances, be required but it is not submitted.

in Wyo. Appendix, p. 31). The Special Master's proposal will allow some additional future uses in that section and also above Pathfinder (report, pp. 133, 135, 147–148), and Wyoming adopts these features of the proposal (Wyo. Br., p. 83). There is no showing that all historical flows below Pathfinder, including those of the Laramie River, were usable and no assurance for the future that they or some of them will not come in unusable flood flows. The long-time annual average excess flow at Pathfinder of 289,000 acre feet (Wyo. Br., p. 63) includes an average spill (water originating above the storage reservoirs unusable there or elsewhere at or above the Tri-State Dam) of 262,500 acre feet (Wyo. Br., p. 27), leaving only 26,500 acre feet of excess to care for the various deductions to be made because of the individual items just mentioned, not all of which can be evaluated on the record in acre-feet but which clearly total a substantial sum. And all of this is based on the 1904–1940 average supply which has been seen to be a more liberal one than there is justification for using.

G. *There Is No Reason for Revision Downward of the Special Master's Requirements in the Whalen to Tri-State Dam Section*

In part 7 of its brief (pp. 67–77) Wyoming urges reductions in the requirements for the Whalen to Tri-State Dam section of the river, as found by the Special Master. Without dweli-

ing on the fact that the reductions urged are to affect only lands located in Nebraska, it may be noted that in each instance where a reduction is requested it is on the general basis that elements of alleged liberality in the Special Master's findings should be eliminated. But there is no corresponding proposal that elements of liberality for all areas above Whalen be eliminated (*cf.* report, pp. 133, 135, 147–148). The existence of that latter liberality is a prime basis, however, for claims made by Nebraska that lands in that State should be given a *larger* allowance than that recommended by the Special Master. Nebr. Br., p. 77. *Cf.* Sec. I, C of this brief, pp. 6–10, *supra*.

1. The Interstate Canal requirement should not be reduced

Wyoming (Wyo. Br., pp. 67–72) proposes three elements of reduction for the Interstate Canal requirement: 15,000 acre feet because of excess acreage recognized; 27,000 acre feet because of possible winter diversions to Lake Minatare larger than those used by the Special Master; and 18,000 acre feet because of water which can be pumped from wells.

The proposed reduction because of excess acreage is based on Wyoming's conclusion that 94,500 acres are all that should be recognized as requiring water, a figure based on the 1936–1940 average of the so-called "developed farms irrigable acreage" data. Wyo. Br., p. 69. This constitutes a re-

duction of 3,500 acres from the acreage found by the Special Master. Wyo. Br., pp. 68–69. The Special Master carefully considered the acreage data (report, pp. 206–209); Wyoming concedes that adjustment of all the data "would require consideration of a large amount of testimony" (Wyo. Br., p. 69); but Wyoming neither produces nor analyzes that evidence, instead of which it relies on an undemonstrated "inference" (Wyo. Br., p. 68) and the bold statement that, "We *believe* the demands of justice can be met by reducing the acreage to the 1936–1940 average of the 'developed farms irrigable acreage'" (Wyo. Br., p. 69—emphasis added).

As to the argument that winter diversion to Lake Minatare should be larger and should therefore create a larger reduction of the irrigation season demand than allowed by the Special Master (Wyo. Br., pp. 69–70), it need merely be said that Wyoming has shown no evidence to disturb the Special Master's conclusion. The Dibble testimony, on which reliance is placed, was squarely based on the needs of the land capable of being served from the inland reservoirs, which is only a limited amount of the land of the Pathfinder District (Tr. pp. 28697–28698 in Wyo. Appendix, p. 79). And Mr. Dibble was figuring in terms of a total of 105,000 acres for the District rather than the 98,000 acres determined by the Master or the 94,500 claimed by Wyoming (report, p. 207–208). It does not appear how much of the acre-

age eliminated was to be served from the inland reservoirs, and the Special Master's acreage determination is not on a basis from which that can be determined on this record.

This record contains no evidence, so far as counsel know, of pumping of water on the Pathfinder District except the quotation from the Pathfinder Irrigation District's annual report mentioned on page 70 of the Wyoming brief. The United States has continually objected to those irrigation district reports as incompetent and still does so. There is no foundation for them and no basis of assuring their accuracy. They are not government reports. In any event, however, there is no evidence of the dependability of the pump supply. Nor is there any showing whether the river water for which it is substituted would suffer more, less or the same loss in transit from the river as the *average* 58 per cent system loss found for the Pathfinder District. Therefore, there is no basis of determining, as Wyoming proposes (Wyo. Br., pp. 70–71), that the pump water justifies an 18,000 acre-foot reduction of the headgate diversion requirement. Furthermore, even if it be assumed that this pump water is available, where is the equity in an apportionment, as proposed by Wyoming, which requires the water users who have contracted for and are paying for storage water to forego that water for the benefit of others and undertake the additional expense of pumping?

2. The Tri-State Canal requirement is not shown to require reduction

The United States points out as to the Tri-State Canal that Wyoming merely disagrees with the weight given by the Special Master to some 800 pages of record dealing with the acreage served (Wyo. Br., pp. 72–74). It is also pointed out that Nebraska disagrees likewise, contending, however, that the acreage should be larger rather than smaller (Nebr. Br., pp. 77–83). *Cf.* section I, C, 1 of this brief.

There seems to be no legitimate basis of attack on the Special Master's conclusions in this regard.

3. The Northport Canal requirement should not be reduced

At pages 74–75 of its brief, Wyoming urges that the Northport Canal requirement be reduced 10,600 acre feet because of the fact that water intercepted in the Tri-State Canal for delivery to Northport does not suffer a 30 per cent loss in the Tri-State system. It is true, of course, that water intercepted by the Tri-State Canal below its headgate will suffer somewhat less loss in transit than water diverted at the Tri-State Dam. It is to be noted, however, that Wyoming's witness Nelson testified that a 30 per cent loss on Northport water between the Tri-State headgate and Red Willow, where it is delivered to Northport, is about right. Report, p. 232. Nevertheless the Special Master

fixes a total loss for Northport of 57.5 per cent which is a figure contended for by Wyoming embodying a loss factor of 27.5 per cent rather than 30 per cent for the carriage above Red Willow. Report, p. 232. This is hardly a "liberal" allowance for loss of which Wyoming can complain. Yet Wyoming relies on its liberality in part for its contention that the Northport headgate requirement should be reduced to the extent of 30 per cent of the intercepted water, saying (Wyo. Br., p. 75):

> The liberal allowance for losses on the Northport (M. R. p. 232), and the reduction that will no doubt be accomplished in the future by reason of the use of these intercepted supplies leads to the conclusion that the requirement for the Northport canal should be reduced 30 per cent of the 35,500 acre feet, which will be intercepted. The 30 per cent value is used because that is the transmission loss between the Tri-State headgate and Red Willow and while some of the intercepted water originates above Red Willow, in our opinion the liberal loss factor of 57.5 per cent warrants the reduction suggested.

Obviously not "some of the intercepted water originates above Red Willow"; it *all* does, since we are discussing interceptions by Tri-State for delivery to Northport at Red Willow. And obviously also, Wyoming's "opinion" is not adequate basis for overthrowing the Special Master's con-

clusions. Particularly is that so when a loss factor of 27.5 per cent is used for all water carried in the Tri-State above Red Willow for Northport despite the testimony that the loss charged against Northport for delivery from the Tri-State headgate to Red Willow is 30 per cent (report, p. 232), and when approximately half of the interceptions are at the Sheep Creek Drain (Nebr. Biennial Report, 1937–1940, p. 826) which is only approximately four miles below the Tri-State headgate (map opposite p. 57 of the report).

H. *The Special Master's Treatment of the Return Flow From the Kendrick Project Is Not Proper*

In part 8 of its brief (pp. 77–80) Wyoming discusses the treatment of Kendrick Project return flow. The United States agrees that all canals below Alcova should be permitted to divert such water as if it were natural flow. It does not agree, however, with Wyoming's concurrence with the Special Master's conclusion that the Kendrick Project be not permitted to divert any natural flow in lieu of its return flow (Wyo. Br., p. 77). This matter is fully discussed at pages 209–215 of the United States' opening brief.

I. *A Complete Equitable Apportionment Should be Made*

The United States agrees with Wyoming's contentions (part 9, pp. 80–82 of its brief) that an

apportionment and a complete apportionment should be made. It does not, however, agree that the Special Master has not made an apportionment in so far as the Kendrick Project and the Whalen to Tri-State Dam section are concerned (Wyo. Br., p. 82). The effect of the controls which he proposes for those areas is designed to effect apportionment, mass allocation not being the only permissible method of apportionment and in this instance not being even the proper one as heretofore shown.

Also the United States points out that omission, in paragraphs 3 and 4 of the Special Master's recommendations, of the Interstate, Ft. Laramie and Northport canals does not create a hiatus in the apportionment as is suggested at pages 82 and 87 of the Wyoming brief. That matter has already been discussed in section I, B of this brief (pp. 5–6, *supra*). It would be otherwise if a mass allocation of both direct flow and storage were to be made as requested by Wyoming.

J. *Conclusion as to Wyoming's Brief*

All of the material contained in Wyoming's proposed decree (Wyo. Br., pp. 82–84), the explanation of that proposal (Wyo. Br., pp. 84–97) and the general discussion thereafter is answered by what has already been said in this brief. Basic throughout, of course, are the concepts, urged by the United States, that the water supply does not

justify mass allocation of the type proposed by Wyoming and that natural flow and storage water cannot be allocated or apportioned together as one common supply, storage water being not subject to apportionment here at all. Basic also is the concept that, in any apportionment to be made, the United States must be included in accordance with its argument at pages 30–177 of its opening brief.

III

ANSWER TO COLORADO'S BRIEF

The principal burden of Colorado's brief is that that State should be dismissed from the case without the imposition of restrictions against it. In that connection Colorado says that, although it believes that there is insufficient showing to entitle any party to relief, the argument will be confined to the Colorado situation except in so far as the principles involved may be deemed to have applicability to the situation of other litigants (Colo. Br., p. 16), which the United States understands to mean that Colorado believes that the case should be dismissed without entering an affirmative decree, but that Colorado actually contends only for dismissal as to itself. The United States submits, however, that the situation is not appropriate for any dismissal, generally or as to Colorado alone, and will discuss that matter first, after which reference will be made to the other points presented in the Colorado brief.

A. *Colorado Is Not Entitled to a Judgment of Dismissal*

1. Colorado has injured and threatens in the future further to injure downstream interests

At pages 16–26 of its brief Colorado undertakes a factual demonstration that, on the record and the report of the Special Master, Colorado has not heretofore injured any downstream interests and does not threaten to do so for the future in such a manner as to justify the imposition of restrictions on uses in Jackson County. It would seem to be immaterial for present purposes whether or not Colorado now is injuring or has heretofore injured anyone. The Special Master's recommended limitation on Colorado uses is not based on past or present actions, and functions only to restrict future uses greater than those of the present or past allowing, actually, a margin of safety over present uses within which margin new uses may be made (report, pp. 128–133). Nevertheless it should be noted that, although the Special Master concludes that present and past uses in Colorado should not be restricted, he did not do so as a result of a finding of no past injury as Colorado indicates at pages 17–19 of its brief. Actually the Special Master found past injury to Pathfinder Reservoir (report, p. 127), which he characterizes as involving amounts of water which are not inconsequential. During the low flow period beginning in 1930 this has obviously had

appreciable affect on the storage water available from Pathfinder for use in the Whalen to Tri-State Dam section of the river, where total supplies were frequently critically short, as appears from the data on pages 69–82 of the report.

But Colorado says also that it threatens no additional future uses, relying on an alleged lack of proof of such threat, on responsive pleadings by the other States alleging the indefinite character of Colorado's proposed future uses of water, and on statements by the Special Master questioning the immediacy of the threat of future expansion of uses in Colorado. It is noteworthy that Colorado does not specifically controvert the Special Master's conclusions that "'he position, intention, and claims of Colorado, as defined in her pleadings and brief and as somewhat clarified by the evidence, may, I think, properly be regarded as constituting a threat of further depletion of the river within North Park" (report, pp. 129–130) and, in response to the rhetorical question whether the threat is of serious magnitude, that "it would seem that the consumption incident to the irrigation of 30,000 to 100,000 acres of additional land in North Park would be sufficiently large, if imposed under any continuation of present conditions, to be regarded as of serious proportions" (report, p. 131). In other words, Colorado does not dispute the conclusion as to threat of injury; instead, it merely questions the imminence of the threat and, in effect, requests

dismissal from the case to avoid restriction of its power to exercise the threat. We do not find in Colorado's brief any assurance that it will not consummate the threat, we find only contentions that no one has proved that Colorado intends to consummate the threat soon.

In that connection it seems significant that, in its Answer and Cross-Bill, Colorado "further admits that the State of Colorado, and its citizens, now contemplate and for a long time have contemplated the diversion and use in Colorado of other additional waters of the North Platte River" (Colo. Ans., Part II, para. 6).[21] This was in answer to Wyoming's allegation that "the State of Colorado and its citizens now contemplate and for a long time have contemplated and threatened and now threaten the diversion and use in Colorado of waters of the North Platte River, which diversion and use would have the effect of taking from the North Platte River a large quantity of water, to-wit, upwards of 250,000 acre feet per annum" (Wyo. Amended and Supplemental Answer, para. Twentieth). That is an admission, even an assertion on Colorado's part of a present intention; it, itself, is a present threat. Nor is its character as such al-

[21] This portion of the Colorado pleading, which is not referred to in the Colorado brief, is followed immediately by the admission that all projects, if constructed, would have taken approximately 250,000 acre feet per annum, to which Colorado does refer at page 16 of its brief.

tered by the subsequent allegation, in the same pa agraph of Colorado's Answer and Cross-Bill, that Colorado is entitled to make such additional diversions and uses. Furthermore, in Part IV of its Answer and Cross-Bill, Colorado asserts that 100,000 additional acres in Jackson County can be and for the proper development of the area must be irrigated from the North Platte River and its tributaries (para. Fifteenth), that investigations have already been made of the physical and economic feasibility of transmountain diversions of North Platte water out of Jackson County into the basin of the Cache La Poudre River (a tributary of the South Platte) and that the latter basin is in great need of additional water (para. Fifteenth), that certain projects were once initiated but stopped only because the United States Secretary of the Interior was able to hold them up to protect the Pathfinder supply by reason of the fact that rights-of-way over public domain were required for them and that the water for those projects was then in fact appropriated (para. Sixteenth), that Colorado protested the Kendrick Project in protection of its alleged right to further use of North Platte River water (para. Seventeenth), and that Colorado has sought a compact to assure the right to future use of water (para. Seventeenth). Moreover, Colorado prays (p. 49, Colo. Ans. & Cross-Bill) for apportionment of water to it based on all of the foregoing

allegations. How, then, can Colorado say that she now threatens nothing?[22]

In its opening brief submitted to the Special Master (pp. 195, 205), Colorado said in speaking of transmountain diversions out of the North Platte watershed, that "economical, feasible and desirable extensions and enlargements of the existing enterprises will result in an increase of this figure by an additional 6,000 acre-feet annually", and that, "As its share of benefits from the flow of the North Platte river and its tributaries which represent future development in addition to that now existing, Colorado says that it is entitled to use consumptively an additional 40,400 acre-feet of water which may be segregated thus: 25,500 acre-feet for the irrigation of the 30,390 acres of irrigable land, 8,900 acre-feet of water to be consumed by evaporation from reservoir surfaces and an additional 6,000 acre-feet of transmountain exportations." See also, report, p. 129. Before the Special Master Colorado, then, argued for the right to increased future use. Certainly, it did not do so with no intent to use the water.

And so, too, in its present brief Colorado argues that, if it be not dismissed, Colorado should have

[22] It is immaterial, of course, that Wyoming and Nebraska replied that Colorado's claims were remote or speculative, as noted at p. 17 of the Colorado brief. Those States were replying to Colorado's alleged claim to apportionment for future uses. Nor does a denial by the opposing parties alter the imminence of the threat.

an increased allowance of water because, "if Jackson County is to maintain its livestock industry to the same extent as it has in the past it will have to develop this additional summer pasture and it cannot do this without increasing its irrigated acreages" (Colo. Br., p. 47; *cf.* pp. 10, 44). There is not, of course, any reason to believe that such development will be deemed less necessary if Colorado be dismissed. Moreover, on pages 50–52 of her present brief Colorado urges that restriction to present uses in Jackson County is violative of the Act of August 9, 1937, c. 570, 50 Stat. 564, 595, on the theory that that act prohibits interference by the Kendrick Project with future developments and uses of water in Jackson County. The restrictions could, of course, violate that statute, as so construed, only if new, future uses are contemplated.

In all of these things, the United States believes that Colorado has and does estop itself to deny the existence or immediacy of any threat to make larger uses of North Platte River water in the future than in the present. Colorado consistently makes the threat as she proceeds through this very litigation.[22]

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[22] The record also shows the imminent threat of additional development. Additional facilities for transbasin diversion of an additional 6,000 acre feet per annum "undoubtedly will be built" when this litigation is concluded if, under the decree, that water will be available for such use. Colorado's own witness Patterson so testified. Tr. 22165–22170. *Cf.* Colo. Br., p. 20. As late as 1938 some work was done to rejuvenate

On pages 20–26 of its brief Colorado, however, contends that whatever the actions of upper states in the use of water, Nebraska as complainant has not shown that actual injury resulted and that certain of the Special Master's conclusions show that to be so. Nebraska at pages 7–24 of its brief, controverts those conclusions of the Special Master.

In this connection Colorado overlooks what the United States believes to be a pivotal conclusion, stated by the Special Master on page 105 of his report immediately preceding the material quoted from that same page by Colorado (Colo. Br., p. 20).

> It is, of course, obvious in general and without any detailed proof that in an arid or semi-arid country deprivation of water for irrigation in time of need cannot be otherwise than injurious to the area deprived.

Thereafter the Special Master points out that the weakness, *if such there be,* in Nebraska's proof of damage is as to the extent of the invasion of

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one of the large projects commenced some years ago and "defeated" at that time by refusal of the Secretary of the Interior to grant rights-of-way over the public domain. Tr. 22422–22425, 22831. Efforts are being made to continue that work. Tr. 22934–22938. In very recent years other facilities have been extended in Jackson County to irrigate additional lands. Tr. 22528, 22550–22554, 22628.

(All record materials to which reference is made here or elsewhere in this brief are reproduced in the appendix hereto unless otherwise noted.)

its rights and the damage to its general economy, prosperity and population. Clearly it was the Special Master's conclusion that deprivation of water in time of need existed and that that was itself injurious "to the area deprived" and an adequate basis of relief despite the equivocal nature of the proven statistics regarding crops and population. Report, pp. 102–105 in conjunction with pp. 87–92.[24] Nor does it avail anything to point out, as Colorado does (Colo. Br., pp. 21, 25), that the Special Master found that during the post-1930 period an average of 81,700 acre feet passed the Tri-State Dam unused, for the Special Master added the finding that of that flow "comparatively little" passed in August or September and that even the total is a minor factor in the balancing of equities between the parties (report, p. 158). Irrigation water, of course, must be

[24] It should be borne in mind that the crop data found and stated by the Special Master at this point does not purport to show the effects of water shortage in particular years such as 1934, 1935 and 1940 when supplies were particularly low and when clearly there was need for water in the Whalen to Tri-State section—although the 9 Wyoming private canals in the section alone got more than an adequate supply (report, pp. 76–79). Also the irrigated acreage data on which Colorado relies at pages 22–24 of her brief is on a 10-year spot basis and does not show intervening variations. Nor is there any evidence or finding that the 12,000 acre increase, 1930–1940, in Nebraska was under canals diverting at or above Tri-State or even at or above Bridgeport, the only areas involved in the Special Master's conclusions or the present positions of any party. Also pertinent to this Colorado argument is the increased Colorado irrigation activity in that same period (footnote 23, *supra*).

available at all times of the season and the need is relatively high in August (report, p. 83) while the regimen of natural stream flows is such that, although they are relatively high in the early summer, they are very low in August and September (report, p. 84). Furthermore, the basic problem and the Special Master's recommendations go only to natural flow water. Report, para. 9 on p. 10, p. 69. The total and critical inadequacy of the Whalen to Tri-State Dam supply of natural flow, 1930–1940, is clearly apparent from the table on page 71 of the report.

2. On the facts here presented apportionment among all parties, including Colorado, is proper and necessary

On the facts, as just discussed, it seems clear that apportionment of natural flow among all the parties to this suit is both appropriate and necessary and that the same considerations apply to the recommended restrictions on future Colorado use. At pages 26–40 of its brief Colorado argues to the contrary.

The United States submits that the case of *Wyoming* v. *Colorado,* 259 U. S. 419 is determinative of the present problem and that it is not distinguishable on the bases mentioned at pages 31–34 of the Colorado brief, or at all. The Court assumed jurisdiction of that controversy on a mere reference to the determination previously made in *Kansas* v. *Colorado,* 206 U. S. 46, that a controversy between states over the use of an

interstate stream "makes a matter for investigation and determination by this court." '259 U. S. 419, 464. Nowhere in the opinion is there any discussion or measurement of the injury which would accrue to Wyoming if Colorado proceeded to make the trans-basin diversion against which Wyoming complained. The existence of injury or threatened injury was merely assumed from the determination that, after making proper allowance for the prior appropriative rights in both states, there was an amount of water left less than that claimed by Colorado for the new trans-basin diversion project. In that situation the Court proceeded, then, to apportion the water between the two states, the only showing of injury or threat of injury being the determined inadequacy of the supply of water to meet all appropriative rights. More than that is shown here; there is also a past deprivation of water and a definite threat of greater future deprivation including the threat in Colorado itself.

New Jersey v. *New York*, 283 U. S. 336, may also be mentioned in this regard. Although it is not a case involving priority rights or irrigation uses of water, it does involve an interstate dispute over an interstate stream and is referred to at page 36 of the Colorado brief. At 283 U. S. 345 the Court considers the injury to New Jersey and recites that there is none found in relation to water power uses, industrial uses, municipal uses, agricultural uses or fishery-for-shad uses. The Court then states that:

> The effect on the use for recreation and upon its [the river's] reputation in that regard will be somewhat more serious as will be the effect of increased salinity of the River upon the oyster fisheries. The total is found to be greater than New Jersey ought to bear, * * *.

The Court then ordered various restrictions on and regulations of the uses to be made by New York. Clearly the injury to New Jersey, on which the decree was founded, was not weighed and found to be of great magnitude. Equally clearly the Court merely found inequity and undertook to secure the general balance of rights and benefits which suits the dignity of semi-sovereign litigants. The case is precedent for the Special Master's recommendations here.

It is true, of course, that this Court in interstate litigation has frequently said that, if relief is to be granted, there must be a threatened invasion of rights of serious magnitude which must be shown by clear and convincing evidence. *New York* v. *New Jersey*, 256 U. S. 296, 309; *North Dakota* v. *Minnesota*, 263 U. S. 365, 374; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669; *cf. Missouri* v. *Illinois*, 200 U. S. 496. *Cf.* Colo. Br., pp. 26–27, 33–34. Those cases, however, did not involve irrigation uses of water in an arid country. Deprivation of water for agricultural use in the western states alone would seem to be an invasion of a right of serious magnitude.

Wyoming v. *Colorado, supra. Kansas* v. *Colorado,* 206 U. S. 46, is not to the contrary, since there the decision was merely that Colorado's use did not exceed its equitable rights. Nor is *Washington* v. *Oregon,* 297 U. S. 517, to the contrary, since the basic decision there was merely that Oregon was not shown to be depriving Washington of water of which it might otherwise make use. If anything each of those latter two cases supports the concept that deprivation of irrigation water itself constitutes invasion of a right of serious magnitude, although Colorado suggests the contrary (Colo. Br. pp. 33–34).

In fact, *Washington* v. *Oregon* may be said to be a strong authority expressly opposed to Colorado's position. After concluding that Washington had not made proper proof that Oregon was wrongfully depleting the stream to the prejudice of Washington irrigators, the Court stated that to repel the claim of wrong, which necessarily means the claim of injury, did not dispose of the case. "The question remains whether the Oregon irrigators as a result of all of their acts are taking to themselves more than their equitable proportion of the waters of the river, priority of appropriation being the basis of division." 297 U. S. 526. And so it is in this case where deprivation of water appears by clear and convincing evidence, and was so found by the Special Master, as already pointed out. The weakness of the proof, "if such there be," is as to the extent to which the deprivation, past or threatened, is

wrongful. Report, p. 105. In other words, the question is whether the uses upstream, present or threatened, are within the equitable rights of the parties. The Special Master, in weighing a great mass of evidence, has concluded that they are not unless controlled in the manner which he recommends.

What was said by this Court in *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, of the La Plata River is equally applicable to the North Platte. "As the La Plata River flows from Colorado into New Mexico and in each State the water is used beneficially, it must be equitably apportioned between the two." 304 U. S. 101. Also, "The extent of the existing equitable rights of Colorado and of New Mexico in the La Plata River could obviously have been determined by a suit in this Court." 304 U. S. 104–105. Equitable apportionment, then, not the necessity for injury, is the principle to be applied in a case such as this involving irrigation uses.

The true doctrine, governing the approach of the Court to a controversy such as this, is put in clear relief by the recent decision in *Colorado* v. *Kansas*, 320 U. S. 383. There the Court (320 U. S. 392) characterizes that doctrine merely as one of "judicial caution in adjudicating the relative rights of States" and, by footnote, points out that:

> *Wyoming* v. *Colorado*, 259 U. S. 419, is not an exception. As it happened, the doctrine of appropriation had always prevailed in

> each of the states there concerned and furnished the most appropriate and accurate measure of their respective rights of appropriation of the flow of the Laramie River. It was, therefore, possible in enforcing equitable apportionment, to limit the amount of water which Colorado might, without injury to Wyoming's interests, divert to another water shed, to an amount not exceeding the unappropriated flow.

Of that quoted language Colorado says (Colo. Br., p. 32) that, "It would seem that the Court has now put at rest for all time the erroneous concept that a different set of rules applies in original interstate actions over interstate waters between states applying the priority doctrine." We believe that the Court has done precisely the contrary since it in effect distinguishes *Wyoming* v. *Colorado* on the basis that priorities were applied in each state—as they are here. Be that as it may, however, certainly that language in *Colorado* v. *Kansas* leads straight and unavoidably to the conclusion that *Wyoming* v. *Colorado* is good law and is unaffected by the subsequent judicial statements regarding the invasion of rights of serious magnitude and the need for clear proof.[25]

[25] The actual decision in *Colorado* v. *Kansas*, dismissing the prayers for equitable apportionment, is not a precedent applicable here, inasmuch as the basic question there was whether Colorado had further depleted the flow passing into Kansas to Kansas' injury since the decision in *Kansas* v. *Colorado*, 206 U. S. 46 (cf. 320 U. S. 393), and the Court found no depletion of that flow at all to have been proved.

In line with the preceding discussion, it is apparent that injury need not be shown at all to justify the making of an equitable apportionment. All that is needed is a showing that the benefits of the stream are not equitably divided between the parties in the absence of an apportionment, or that threatened action of one of the parties will result in an inequitable division. However, as has been shown in the prior subsection, there is injury and threat of injury sufficient to found an apportionment, even if such a showing were required, in line with Colorado's theory. Certainly the facts and the findings regarding injury here are stronger than in *Wyoming* v. *Colorado* and *New Jersey* v. *New York*, where apportionment was made.

Colorado's position is not strengthened by its reliance on the alleged lack of jurisdiction of the Court because of the absence of a justiciable controversy. Colo. Br., pp. 27–30. It is not necessary to analyze the many complex cases dealing with the definition of a justiciable controversy; it is necessary only to point out that such a controversy exists and the Court has jurisdiction where the dispute concerns the use of interstate waters. There has been no substantial doubt of that since the exhaustive analysis of its jurisdiction made by the Court in *Missouri* v. *Illinois*, 180 U. S. 208, reapplied in *Kansas* v. *Colorado*, 185 U. S. 125, 206 U. S. 46. So far as counsel know, that proposition has not been questioned in the decision of

any interstate water suit since then. And thus it is that in the most recent of those cases, *Colorado* v. *Kansas*, the Court merely states generally that it has jurisdiction of such disputes. 320 U. S. 392. Such suits no more involve mere abstract questions (Colo. Br., pp. 28–29) or pure conflicts of sovereignty (Colo. Br., p. 4) than do interstate boundary disputes which, of course, have long been considered to present a justiciable controversy over which the Court has jurisdiction.[28]

These interstate water disputes fall squarely within the second alternative stated by the Court as basis for a justiciable controversy in *Massachusetts* v. *Missouri*, 308 U. S. 1, 15 (Colo. Br. pp. 28–29); the complainant asserts a right which is and has been held to be susceptible of judicial enforcement according to the principles of jurisprudence. Colorado apparently considers the case solely with reference to the first alternative in which the complainant must suffer a loss, through the action of other parties, furnishing a claim for judicial redress. But, as has been shown, the facts in this case bring it well within that alternative also.

Colorado (Colo. Br., pp. 27, 30) confuses this question of jurisdiction or justiciable controversy

[28] Compare *Rhode Island* v. *Massachusetts*, 12 Pet. 657, where this problem was extensively argued before the Court and analyzed by the Court, with *Kansas* v. *Missouri*, 322 U. S. 213, where the jurisdiction is assumed and the Court merely speaks in terms of settlement of a "dispute" over boundaries.

with the question of the right of a complainant to relief or the propriety of action by the Court in entering an affirmative decree. That the two categories of question are separate is not only the conclusion of logic but it is also the conclusion apparent from many cases including *Missouri* v. *Illinois*, *Kansas* v. *Colorado* and the recent *Colorado* v. *Kansas*, all *supra*, in the latter of which the Court declared its jurisdiction over such controversies but expressed its caution in granting relief and actually denied relief on the controversy there presented. It has already been shown that, jurisdiction existing, this case is one where an affirmative decree is proper and should be entered.[37]

One other Colorado contention, however, should be mentioned briefly. In its brief Colorado argues in substance (pp. 35–40) that to enter a decree of apportionment here would be to force a compact on the litigants by judicial fiat, and (pp. 34–35) that the Court could not do that even if counsel for the states, by pleading or otherwise, consented to such a decree.

The principle of equitable apportionment, of course (Colo. Br., pp. 35–36), does not involve an

[37] That this case does not involve an effort merely to secure water for possible future developments, as in *Arizona* v. *California*, 283 U. S. 423 (Colo. Br., p. 29), or an effort merely to apportion "rights of use which have not attached" (Colo. Br., p. 30) is abundantly clear from the facts already recited regarding the water supply for existing rights.

equal division of water, but rather an apportionment of the use and benefits of the stream having regard to the "equal level or plane on which all the states stand, in point of power and right under our constitutional system", and "without quibbling over formulas." *Connecticut* v. *Massachusetts*, 282 U. S. 660, 670; *New Jersey* v. *New York*, 283 U. S. 336, 343. Consequently any decree which does so apportion the benefits of a stream is a proper judicial, equitable apportionment and not the equivalent of the making of a contract with a divergent *quid pro quo*, which this Court will not do, as stated in *Kansas* v. *Colorado*, 206 U. S. 46, 100, and as stated on page 37 of the Colorado brief. *New Jersey* v. *New York*, *supra*, and *Wyoming* v. *Colorado*, 259 U. S. 419, also *supra*, illustrate the difference and have already been shown to justify apportionment in this case. It is true, naturally, that apportionment normally fixes restrictions on the upper state or states (Colo. Br., pp. 37–39), but it is abundantly clear that the Court may do and has done that. The equality of the states is not impaired thereby; if it be affected at all, it is enforced in the apportionment of benefits which results. To make the case proper for apportionment by this Court it is merely necessary that the benefits be shown not to be properly distributed, in the light of all the circumstances, by the uses being made or by

threatened additional uses. *Cf. New Jersey* v. *New York, supra; Wyoming* v. *Colorado, supra.*

The Court, of course, does approach such matters with caution and takes the position that the settlement of such matters by compact rather than invocation of the adjudicatory power is best and preferable. *Colorado* v. *Kansas,* 320 U. S. 383, 392; Colo. Br., pp. 38–39. But that does not mean that, if the states cannot agree and if there is a legitimate present dispute among them, involving a present or threatened inequitable distribution of the benefits of the stream, the Court cannot or should not make an equitable apportionment. In this instance Colorado itself pleads unsuccessful attempts to arrive at a compact or agreement on this stream (Colo. Ans. and Cross-Bill, Part IV, para. Seventeenth)[*] and, as early as 1925, authorized negotiation and settlement of the problems of this river (Colo. Stats. Ann., 1935, sec. 90–75). Furthermore, the Special Master states that all efforts at settlement or compact "appear to have failed". Report, p. 38."

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[*] This allegation refers to a division of "surplus" water but does so in terms of the situation before the undertaking of the Kendrick Project which is directly involved in this litigation, which Colorado considered to be an unwarranted threat to its use of water, and which was undertaken shortly following the years of high water run-off preceding 1930.

[**] The relationship between the adjudicatory power of the court and the compact clause of the constitution is quite extensively discussed in the early interstate boundary dispute of *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 724–732.

The recent boundary dispute of *Kansas* v. *Missouri*, 322 U. S. 213, is pertinent to the basic problem of the power of the Court to settle disputes between states even though the effect may be one achievable by compact. Those states were in dispute regarding their boundary at numerous points along the Missouri River. During the pendency of the litigation the parties agreed to a settlement as to all disputed areas except one, the settlement (not legislatively approved) being made a part of the decree. 322 U. S. 213, 214, footnote 4. In that instance the Court actually exerted its judicial power in a matter where the controversy, although existing at the outset of the litigation, had been settled before the entering of decree, as obviously it may since it is a judicial function and an exercise of judicial power to render judgment on consent (*Pope* v. *United States*, No. 26, this Term, decided November 6, 1944, and the cases there cited). That case appears to answer Colorado's argument that state officials could not consent to an injunctive decree against the state. Colo. Br., pp. 34–35. Also the case, in dealing with the remaining area in dispute between the parties, adopts and applies the rule of preponderance of proof in judgment of the complainant's right to relief in an interstate suit.

In all of these circumstances, then, the United States urges that neither Colorado nor the suit

itself should be dismissed without the making of an equitable apportionment."[80]

B. *The Recommended Limitations on Colorado Use Are Proper*

1. Errors in the form of the recommended decree

The United States does not controvert the suggested corrections in the recommended decree to

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[80] There is a separate ground, it is submitted, why decree rather than dismissal should be entered. The United States, as an intervenor, is asserting an affirmative right to water for its projects as against the litigant states, a right which can be given effect only by a designation, necessarily involving allocation or apportionment on the facts of the case, of the water for those projects as against all the states making adverse use or claiming adverse right to use. Although it is common doctrine that an intervention or other ancillary proceeding falls with the failure of the basic proceeding, that seems to be so where the failure of the principal proceeding coincides with the lack of independent jurisdictional elements in the ancillary proceeding. *Cf. Cabaniss* v. *Reco Mining Co.*, 116 Fed. 318 (C. C. A. 5); *Colony Coal & Coke Corp.* v. *Napier*, 28 F. Supp. 76, 80 (E. D., Ky.). An intervention or other ancillary proceeding may survive the principal proceeding and constitute alone a basis of decision if it presents an affirmative and proper claim for relief within the jurisdiction of the court. *Labarre* v. *Burton-Swartz Cypress Co.*, 128 La. 982 (1910); *White* v. *Old York Road Country Club*, 318 Pa. 346 (1935); *Bogerdus* v. *Santa Ana Walnut Growers' Asso.*, 41 Cal. App. 2d 939 (1940); *cf. Bramforth* v. *Ihmsen*, 28 Wyo. 282 (1922). Analogous are the holdings that an intervenor may appeal independently where he affirmatively asserts a legal right which was affected by the decision below. *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632, 634; *Sprunt and Son* v. *United States*, 281 U. S. 249, 256–257; and the cases there cited.

which attention is called in part II, 1 of the Colorado argument (Colo. Br., pp. 40–41).

2. The Special Master has properly recommended apportionment based primarily on the conditions existing since 1930

In part II, 2 of its argument (Colo. Br., pp. 41–46) Colorado urges that it is inequitable to base apportionment on an analysis of conditions and needs of the "drouth period" existing since 1930. In using the phrases, "drouth", "drouth conditions" or "drouth period", Colorado begs the fundamental question. A period may be characterized by the word "drouth" only when, by comparison with long-term conditions, it appears definitely subnormal. The basic question presented by the Special Master is whether the post-1930 period is a drouth period at all or whether it constitutes or presages a new norm. The answer to that question is still unknown. But it *is* known that the low flow conditions of the 1931–1940 decade continue and that, under the most liberal application of the principles announced in *Wyoming* v. *Colorado*, 259 U. S. 419, they must be resorted to in determining the supply on which the equities of the parties are to be judged. See the discussion contained in part II, A of this argument (pp. 12–21, *supra*), in reply to Wyoming's contentions regarding the water supply.[21]

[21] It is said at pages 42–43 of the Colorado brief that, if Colorado decided that climatic conditions justified future

At pages 43–44 of its brief Colorado argues that the Whalen to Tri-State Dam section, under the Special Master's recommendations, is given a full supply ideally distributed while Colorado is limited to the uses which were made there during the post–1930 period. But Colorado does not undertake to show that its uses during that period were restricted from former uses by the shortage of water supply or that Colorado areas suffered any injury then by comparison with former conditions. That concept of lack of injury is invoked only against the Whalen to Tri-State Dam section.[22] Actually, Colorado is shown not to have suffered during the post-1930 period. Irrigation development since 1920, including the 1920–1930 high water period, came "practically * * * to a standstill" (report, p. 43) in Colorado, and de-

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relaxation of the decree to be entered herein, proceedings would have to be brought in this Court which, "if their determination took as long as this present case has", would delay the decree until another dry cycle had started. Assuming for this argument only that we are here faced with a problem of changing cycles, the answers to that suggestion are twofold: (1) That the determination would not take so long since the only significant new issue there would be water supply whereas here the great preponderance of evidence has been on the questions of water needs or requirements; and (2) that the major injury in such an instance would ultimately be not to Colorado but to the downstream users during the ensuing drouth period, a problem regarding which the downstream interests express no concern.

[22] The United States, of course, denies lack of injury in the Whalen to Tri-State section.

creed water rights having priorities in the period 1920–1939 are only 1.4 per cent of the entire decreed rights in Colorado (report, p. 46). Despite those facts, however, Colorado had a supply adequate to undertake some extension of facilities during the post-1930 period and threatens more for the future. Footnote 23, *supra*, page 50.

Assuming, nevertheless, that Colorado does have "chronic" shortages which could be alleviated by further reservoir construction (Colo. Br., p. 44), it is apparent that those shortages are only material in July (Tr., pp. 22861–22862 in Colo.'s Appendix, pp. 51–52) and that they result, not from the actions of downstream users, which of course in the absence of interstate apportionment have not affected and could not affect Colorado uses, but from long-time natural conditions associated with the early-season nature of the high mountain run-off (*cf.* report, p. 43). There is, of course, no equitable reason why Colorado should be given permission, in such circumstances, to build additional reservoirs now at the expense of the Pathfinder Reservoir and the storage water users of the Whalen to Tri-State section with their 1904 storage priority right. *Cf.* report, p. 127. As conceded by Colorado at page 45 of its brief, existing development is to be protected. And, from what has already been said, it is apparent that it will not be protected if there be additional development in Colorado when the

available water supply for apportionment is properly analyzed."

At pages 45–46 of its brief Colorado argues that future surpluses will become available for expansion of development in the Whalen to Tri-State section, which situation then will create vested rights before Colorado can secure relief by amendment of this decree. There is, of course, no showing of the present propriety of anticipating any dependable supply in excess of present needs, nor is there any showing of the physical possibility or feasibility of expansion of development in the already highly developed Whalen to Tri-State section. Perhaps even more importantly, it seems clear that Colorado could make complaint or petition for relief immediately on the undertaking of new development, which action itself would give full protection against any claim of vested right.

The United States also controverts the only remaining argument advanced by Colorado on this matter. The Special Master has *not* ignored the prospective effect of Seminoe and Alcova reservoirs as contended by Colorado (Colo. Br.,

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** Colorado's reference to the small, but ample diversion in the Whalen to Tri-State area in 1941 (Colo. Br., p. 44) is beside the point. Climatic conditions are the stated and obvious reason for that situation. These conditions vary, however, and conservation of water in storage from a season of low need to succeeding ones of high need is one of the rights of the Whalen to Tri-State storage water users which cannot be interfered with by allocation to Colorado.

p. 46). He has relied on the Nelson and Dibble studies in considering the water supply and its effect on the equities of the parties and both of those studies assumed the operation of those reservoirs.

In conclusion on this phase of Colorado's argument one additional matter must again be pointed out. The Special Master actually allows increased future uses in Colorado, within modest limits but certainly fully as far as the water supply justifies. Report, p. 133.

3. The recommended apportionment to Colorado is fair

At pages 46–48 of its brief, Colorado urges that the Special Master's apportionment to Colorado is unfair because it excludes 30,390 acres irrigable under constructed ditch systems and because there is increasing need for irrigated pasture in North Park to maintain the livestock industry there.[34] Particularly significant is the fact that, although Colorado says all of the 30,390 acres have been irrigated at some time in the past, nowhere does it say, nor can it say, that that acreage has been irrigated at any time so that, when combined with other acreage then irrigated, it totaled more than the Special Master allows. In the Whalen to Tri-

[34] It should be noted that the 135,000 irrigated acres recognized by the Special Master is not in accord with the Colorado testimony, as Colorado says it is (Colo. Br., p. 46). It is 3,200 acres larger than the acreage shown by the Colorado testimony. Report, pp. 127, 133.

State section the total area calling for or needing water at any one time, not the total of all acreage which may ever have been irrigated at any time, is the test used by the Special Master, and it is the obviously proper test to be used in all areas.

Furthermore, even if the Colorado lands were shown to have been of greater total acreage at some one time prior to the post-1930 period, it would not show any unfairness in treatment as compared with the Whalen to Tri-State section. As to the Interstate Canal alone in that latter section it appears that the Special Master recognizes an acreage of 98,000 although the irrigable acreage under constructed works is 113,000 (report, p. 207) and although the "developed farms irrigable acreage", which is the acreage category heavily relied on by the Special Master in arriving at his conclusions (report, pp. 207–208), was 105,000 and higher in the pre-1930 period (report, p. 207).

In arguing regarding the maintenance of the livestock industry (Colo. Br., p. 47) it is significant that, from testimony which Colorado correctly characterizes as showing that the number of livestock permitted to graze on public land in the future "may" never again be as large as in the past, Colorado concludes that, if Jackson County is to maintain its livestock industry on the past level it "will" have to develop additional irrigated pasture. It is also significant that Colorado does not show any reduction in livestock

during the post-1930 period when the use of public domain was restricted.

4. The effect of the Special Master's recommendation will be no improper disturbance of the relationships among Colorado water users

The United States submits that clearly no interference with the relationships among Colorado water users will result from the Special Master's recommendations, although Colorado suggests the contrary at pages 48–49 of its brief. The limitations on acreage, storage and transmountain diversion will not, of course, affect the relative rights of users within any one of those specified categories as among themselves. Nor will the limitations on any one or two of those categories adversely affect the rights of users in the other category or categories. The only problem is whether a specific limitation as it operates on the users within the category thus limited adversely affects their own rights in terms of the relationship between them and users in other categories. Clearly the acreage limitation does not, since it encompasses all existing development. Just as clearly the storage limitation does not, since there are appropriations for storage aggregating only 17,000 acre feet, the exact amount of the limitation imposed (report, p. 133). And equally clearly the transmountain diversion limitation does not, despite Colorado's suggestion (Colo. Br., pp. 48–49) that the transmountain users may, on

a priority basis of intra-state administration, be entitled to more than the permitted 6,000 acre feet a year. In a particular year that may be so, but that would be cured by Colorado's request, to which the United States does not object, that the limitation be put on an average basis (Colo. Br., pp. 40–41). The average of past use, during periods of high and low flow, has been only about 4,000 acre feet a year (report, p. 44), leaving a substantial 2,000 acre-foot margin of safety.

Colorado also argues in this connection (Colo. Br., p. 49) that disruption of intra-state relationships can and should be avoided by the use of compacts rather than decrees. That the use of compacts clearly does not avoid such disruption is abundantly evidenced by the conflict which this Court was called upon to determine in *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, the significance of the decision in which is set out at pages 189–192 of the United States' opening brief. Moreover, intra-state relationships can legally be disturbed, as there shown, where proper and equitable allocation requires.

C. *The Appropriation Act of August 9, 1937, Is Not a Bar to the Apportionment Recommended by the Special Master*

In part III of its argument (Colo. Br., pp. 50–52) Colorado urges that the apportionment recommended by the Special Master contravenes the provision of the appropriation act of August

9, 1937, c. 570, 50 Stat. 564, 595, which is there quoted. Colorado's argument is destructive only, since it proposes no means by which the statute might be given operative effect, if it now has none, within the framework of the Special Master's recommendations.

This statute, which provides in substance that "neither the construction, maintenance, nor operation of said [Kendrick] project shall ever interfere with the present vested rights or the fullest use hereafter for all beneficial purposes of the waters of said stream or any of its tributaries within the drainage basin thereof in Jackson County, in the State of Colorado" does not deprive this Court of its constitutional power to make an equitable apportionment, although it may subordinate the right of the United States to obtain water for Kendrick at the expense of Colorado. Obviously the statute does not limit or restrict Nebraska's or Wyoming's claim for apportionment as against Colorado. If the three states are correct in their contention that the United States has no independent claim to project water free from the control of the state in which a particular project is located, the statute can have no effect on any part of the apportionment herein, inasmuch as the apportionment would be solely between Colorado and the other states.

And even if, as we believe to be the case, the United States has independent standing, it can

not be shown that any limitation upon Colorado's rights is for the benefit of the Kendrick project. The limitations recommended on Colorado uses are not recommended for the purpose of protecting or providing a supply for the Kendrick project. Report, pp. 125–133, particularly 131. The significance of that fact is augmented by the further facts that Kendrick is almost entirely a storage project (report, pp. 139, 143) which will, under the Special Master's plan, get water from the North Platte River only if and when the 1895–1939 average conditions of supply repeat themselves (report, p. 143). Kendrick's reservoirs will get water only after Pathfinder has filled. Report, p. 178, para. 4. The benefit it receives from the limitations on Colorado, consequently, is purely incidental and entirely indirect, being the result of the operation of those limitations on the Pathfinder and Whalen to Tri-State Dam supply for which alone the limitations are found to be necessary.

In all of these circumstances, and also considering the additional facts that the Colorado limitations go only to certain *future* uses and that only a minor portion of the water available at Pathfinder originates in Colorado (report, pp. 21–22), it seems clear that the Special Master's recommended apportionment does not violate the provisions of the Act of August 9, 1937, even if it were applicable. It is also apparent that the

limitations on Colorado could not be removed without disturbing the equitable relationships between that area and lower areas, excluding the Kendrick Project, and thereby affecting the constitutional power of the Court to make equitable apportionment in this case."

D. *The Recommendation of the Special Master Permitting Modification of the Decree is Proper*

In part IV of its brief (pp. 52–58) Colorado argues that the final recommendation of the Special Master, permitting application for amendment of the decree if future conditions warrant it, is seriously objectionable. A considerable portion of that argument is based on Colorado's concept that no injury has been shown in this case and that problems such as this should be settled by compact. As to those general points, the United States respectfully refers the Court to its discussion of those contentions in part III, A, of this brief (*supra*, pp. 45–65) in response to Colorado's main argument on them.

The Special Master's recommendation merely makes express what would be implicit in any event. Without such a provision one of these parties could undoubtedly apply for relief from the decree in the future, and would be heard on

" Even if it should be provided that the limitations on Colorado uses should be inoperative when Pathfinder Reservoir is full, the equitable relationships between the Colorado area and all areas above Whalen would be disrupted.

that matter if it made a prima facie showing of changed conditions to justify alteration of the decree. Also the recommendation has specific counterpart in the sixth paragraph of the decree prescribed by this Court in *New Jersey* v. *New York*, 283 U. S. 336, 348. That latter fact alone should dispose of Colorado's entire argument on this point, but brief reference will be made to several other considerations.

The Court is not asked to perform either the function of administering the distribution of the water of the stream or the function of an administrative, as distinguished from a judicial, body as appears to be suggested by the arguments at pp. 53–55 of the Colorado brief. The Court is asked, instead, to settle a justiciable controversy, as has already been shown, and to prescribe the controls under which the appropriate administrative officials, state or federal, will administer the water supply. Nor will the Court entertain frivolous motions to alter the decree. Obviously it is intended that the Court entertain motions based only on a legitimate claim of truly changed conditions, if any there be, justifying changes in the principles of the decree and, equally obviously, the Court will act only in that manner.

It may also be appropriately pointed out that compacts no more accommodate themselves to future conditions than do decrees, and that they, too, are subject to change, on agreement of the

parties. *Cf.* Colo. Br., pp. 56–57. Nor do compacts solve the day to day problems of administration; they, like decrees, set up controlling principles and leave to proper administrative officials the function of distributing the water. *Cf.* Colo. Br., p. 54.

Colorado's related argument (Colo. Br., pp. 57–58) that the Special Master's recommendation will operate to shift the burden of proof from the downstream complainant to the upstream defendant is not well founded. It overlooks the fact that when an apportionment is made it is on a determination of the equitable rights of the parties in the benefits of the stream. Manifestly, he who wishes thereafter to challenge the continuing equitableness of the apportionment must establish his case.

E. *Conclusions as to Colorado's Brief*

For the various reasons stated, addressed to each of the points raised in Colorado's brief, the United States submits that Colorado has shown no basis for dismissal of this suit generally or as to itself alone, and that none of the objections raised by Colorado to the form or substance of the Special Master's recommendation are sound except, perhaps, those going to the so-called "errors" discussed in part II, 1 (pp. 40–41) of its brief.

GENERAL CORRELATION OF THE POSITIONS OF THE PARTIES

In view of the complex nature of the issues and arguments the United States undertakes here a correlation of the positions of the parties on the basic issues which have evolved from the exceptions and the briefs. No analysis of the soundness of the positions is attempted, since the substance of the various arguments has already been examined.

1. Nebraska argues basically that both the actual past damage and injury to Nebraska, as well as threatened future damage and injury, justify the granting of relief to it and the making of an equitable apportionment by the Court. In that connection it objects to subsidiary conclusions of the Special Master regarding injury or damage, but not to his ultimate conclusion that affirmative relief and apportionment should be granted. This argument is based both on a claim of injury and a claim of inequitable distribution of a too-small supply and of the benefits to be derived from that supply. Nebr., Br., pp. 7–24. Wyoming and the United States agree that an equitable apportionment should be made. Wyo. Br., pp. 80–82; U. S. Br., pp. 4–6.[35] Colorado con-

[35] In this part of the brief reference will be made both to the United States' opening brief and to this brief, the former being designated, as heretofore, "U. S. Br." and the latter being designated merely "this brief".

tends, however, that no apportionment involving limitations on its uses should be made and that it should be dismissed from the suit. Furthermore, Colorado suggests that no apportionment at all should be made and that the entire suit should be dismissed. Colo. Br., pp. 15–40, 52–56. The United States specifically opposes this position of Colorado's (this brief, pp. 45–65), as no doubt Nebraska and Wyoming also will in their answering briefs.

2. Nebraska urges that the dependable supply of water to be considered as a basis for equitable apportionment is that characterized historically by the post-1930 period, a deficient supply. Nebr. Br., pp. 24–27. Wyoming takes a contrary position, maintaining that the supply to be apportioned is to be measured by the long-time historical supply and that, with present reservoir capacity and with proper controls to be established by the Court in this proceeding, that supply is sufficient and adequate to meet all legitimate requirements. Wyo. Br., pp. 10–31, 91–99. Colorado takes the same position on this matter as does Wyoming. Colo. Br., pp. 41–48. The United States, however, agrees with Nebraska that the post-1930 period provides the most appropriate guide to the dependable supply. This brief, pp. 11–21.

In this connection it should be noted that the nature of the supply available may be pertinent to

two other distinct problems: (1) The existence of injury or threatened injury and the need for apportionment; and (2) the method of apportionment to be decreed. As to the former the problem goes to the adequacy or measurement of the supply in terms of needs and benefits in particular areas historically. As to the latter the problem is entirely different and goes to the possibility of distributing the supply and its benefits equitably under the restraints or controls to be imposed by the decree. The argument as to the asserted impropriety of relying on the post-1930 period is apparently not invoked by Colorado in aid of its argument for dismissal (*cf.* Colo. Br., pp. 15–40), but is invoked only in its attack on the method of apportionment proposed (Colo. Br., pp. 41–48). Wyoming also addresses its argument on the matter only to the problem of the nature of the apportionment to be decreed.

3. Nebraska urges that the distribution of water below Whalen should be on the basis of a priority schedule and that the Special Master has erred in not so recommending. Nebr. Br., pp. 28–47, 55–71. The United States agrees with that position, although it does so on somewhat variant grounds. U. S. Br., pp. 186–193; *cf.* this brief, pp. 22–24. Colorado takes no position on this matter, which affects merely the mechanics of apportionment and distribution in the below-Whalen area. Wyoming, however, takes the position that any decree,

on the basis of a priority schedule or otherwise, which affects individual rights is improper, the position being expressed in support of its contention for so-called mass allocation (Wyo. Br., pp. 31–40).

Wyoming's proposed mass allocation would alter completely not only the Special Master's mechanism but also his entire plan of apportionment as to the Kendrick Project and the Whalen to Tri-State Dam area, and is specifically opposed by the United States (this brief, pp. 21–24). The Wyoming proposed mass allocation would combine storage water with natural flow and apportion both (Wyo. Br., pp. 40–57), which the United States contends should not and cannot legally be done (this brief, pp. 25–33).[37] It would also require joint operation of the Pathfinder and Seminoe reservoirs (Wyo. Br., pp. 57–60), which the United States concedes to be desirable but not presently permissible because of the form of outstanding storage water contracts. The United States requests that the decree permit such operation if the contracts be subsequently renegotiated (U. S. Br., pp. 207–209; this brief, pp. 34–35). Although Nebraska's answer to Wyoming is not yet available, it seems that its position is opposed, not

[37] The United States also specifically requests certain amendments of the Special Master's recommendations for a decree to protect the separate integrity of storage water in the operation of the apportionment to be made. U. S. Br., pp. 193–197, 216, 218.

only to the mass allocation but also to the apportionment of storage and natural flow as a common supply and to joint operation of the reservoirs (*cf.* Nebr. Br., pp. 55, 56–63, 67–68, 86–88). What, if any, position Colorado may take is unknown at this time.

4. The United States maintains that, whatever the form of apportionment to be made, it must be included as one of the parties to which water is apportioned, being entitled to receive the allocation made for the benefit of the North Platte Project, including the Pathfinder and Guernsey reservoirs, and the Kendrick Project, including the Seminoe and Alcova reservoirs.[38] U. S. Br., pp. 30–177, 183–193. The other parties have consistently denied this claim of the United States and no doubt will do so again in their answer briefs.

5. All parties urge some changes in the specific limitations recommended by the Special Master as a part of his apportionment.

(a) Nebraska urges that water originating above the Tri-State Dam should be made available for Nebraska canals diverting between the Tri-State Dam and Bridgeport. Nebr. Br., pp. 47–55. Wyoming's position apparently is in opposition to any such change in the Special Mas-

[38] As an incident of its first cause of action the United States also claims the right to be decreed to be the owner of any unappropriated water in this non-navigable stream.

ter's recommendations. Wyo. Br., p. 14. The United States opposes such a change (this brief, pp. 3–5) and, in fact, seeks alteration of the form of the Special Master's recommended decretal provisions to effectuate more certainly the conclusion that no up-river water is needed below Tri-State (U. S. Br., pp. 202–207).

(b) Nebraska also takes the position that certain requirements found and recognized by the Special Master for Nebraska lands in the Whalen to Tri-State Dam section are too small. Nebr. Br., pp. 69–70, 77–83. Wyoming, on the other hand, argues that certain of the requirements for Nebraska lands in that area are too large. Wyo. Br., pp. 67–77. The United States makes no objection to the Special Master's findings in that regard and opposes the changes sought both by Nebraska and Wyoming. This brief, pp. 6–10, 36–42. Colorado merely states that the Special Master's requirements in this area are believed to be on the liberal side, but that they are supported by substantial evidence. Colo. Br., p. 3.

(c) It is also argued by Nebraska that, leaving the Kendrick Project out of account for present purposes, the Special Master has allocated too much water for use above Whalen both in Wyoming and Colorado. Nebr. Br., pp. 71–77. Colorado, however, takes the definite position that the limitations on its use are too strict and permit use of too small a quantity of water, as well as

the related position that the result of that situation is to disturb the relationship among Colorado water users. Colo. Br., pp. 41–49. Wyoming does not controvert the Special Master's treatment of these various areas (Wyo. Br., pp. 36, 84–85) nor does the United States, except that it does object to the failure to prescribe a limitation on storage of water on tributaries entering the river between Pathfinder and Guernsey or Whalen (U. S. Br., pp. 177–183), in which objection Nebraska also joins (Nebr. Br., p. 76). The United States specifically opposes Colorado's contentions regarding the limitations placed on its uses. This brief, pp. 66–73.

6. Colorado urges that the Special Master's recommended apportionment is violative of the Act of 1937 prescribing conditions to govern the operation of the Kendrick Project. Colo. Br., pp. 50–52. The United States opposes this position (this brief, pp. 73–76), while the position of other parties is not yet expressed.

7. Colorado also takes the position that the recommendation of the Special Master permitting applications for future amendment of the decree is objectionable. Colo. Br., pp. 52–58. Wyoming's position is contrary although it suggests an alteration of the Special Master's recommendation. Wyo. Br., pp. 84, 96–97. Nebraska appears not to oppose the Special Master's recom-

mendation on this matter, and the United States supports it, opposing Colorado's objection (this brief, pp. 76–78).

8. The United States urges that the decree to be entered must deal with all sections of the river above Tri-State and that the Special Master is in error in suggesting (report, p. 180) that his recommendations are not interdependent. U. S. Br., pp. 219–220. Wyoming takes the same position on that matter as does the United States. Wyo. Br., pp. 81–82.[39] Nebraska does not appear thus far to have taken a position on this matter, but Colorado relies on the Special Master's suggestion (Colo. Br., p. 13).

9. The United States takes the position that the Special Master's recommendation regarding return flow water from the Kendrick Project should be modified. U. S. Br., pp. 209–215. Wyoming suggests that that recommendation should be eliminated, but on grounds in part differing from those relied on by the United States. Wyo. Br., pp. 77–80. Nebraska and Colorado have not yet taken positions on this matter.

10. Each party urges certain perfecting amendments to the Special Master's conclusions and recommendations, many of which are of impor-

[39] The context of the Wyoming brief at this point indicates that the word "interdependent" on page 82, fourth line, should be "independent".

tance. So far, no opposition has been registered to these suggestions. They may be enumerated, succinctly, as follows:

(a) *Nebraska*

(i) Guernsey Reservoir rather than Whalen should be the point of reference for the upper limit of the section of the river commonly designated as having its beginning at Whalen. Nebr. Br., p. 89.

(ii) The Wyoming area above Pathfinder should be defined to exclude Seminoe Reservoir. Nebr. Br., p. 89. Wyoming and the United States join in that position. Wyo. Br., pp. 83, 85; U. S. Br. pp. 200–201.

(iii) The term "Jackson County" rather than "North Park" should be used to designate the Colorado area in the North Platte watershed. Nebr. Br., p. 90. Colorado makes this same point. Colo. Br., p. 40.

(b) *Wyoming*

(i) See (a) (ii), above.

(ii) The decree should not affect the use of water for usual domestic, municipal and stock watering purposes. Wyo. Br., pp. 84, 96. This should be so for the entire decree and not merely as to the restricted areas mentioned by Wyoming.

(c) *Colorado*

(i) See (a) (iii), above.

(ii) The restrictions on Colorado "transbasin" diversions should be put on an average basis. Colo. Br., pp. 40–41.

(d) *The United States*

(i) Colorado and Wyoming should be required to keep complete, accurate and available records of irrigation and storage in areas above Pathfinder. U. S. Br., pp. 198–200.

(ii) See (a) (ii), above.

(iii) The decree should provide that it does not govern or affect water, or return flow from such water, which hereafter may be imported into the North Platte basin from foreign watersheds. U. S. Br., pp. 217–218.

(iv) The natural flow right of the Northport Canal should be recognized for 186 second feet rather than 65 second feet. U. S. Br., pp. 224–225.[40]

CONCLUSION

For the various reasons stated in this brief and in its opening brief the United States believes and urges that all of its exceptions should be approved by the Court and that a decree of apportionment should be entered as recommended by the Special Master, subject to the changes requested in the ex-

[40] The United States raises three other objections to the Special Master's report (U. S. Br., pp. 220–224, being parts XIV, XV, and XVI of the "Argument") which it does not waive and on which reliance is placed in the course of other arguments. These require attention but not specific recognition in the decree.

ceptions of the United States but subject to the changes requested by other parties only to the extent that their positions are not opposed in this brief.

Respectfully submitted.

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APPENDIX

* * * * *

Q. Will you summarize the present exportation development?

A. The existing enterprises are all located at Cameron Pass. They are the Cameron Pass Ditch and the Michigan Ditch. Together these export water from the headwaters of the North Platte River or from this tributary, the Michigan River, in amounts ranging from 1000 acre feet in deficient seasons to about 8000 acre feet in the best water supply years. The average of such diversions for the period of the record, 1913 to 1939, having been about 4000 acre feet.

I want to state in that connection that our studies show that the ditches as originally constructed and as extended and enlarged during past years, I believe all of those some time ago—at any rate our studies in recent years when daily discharges have been available show that we might anticipate in a mean future a cycle of years, assuming the present diversion capacity to be maintained, not to be enlarged or extended, at approximately 6000 acre feet per season.

The extensions of these ditches as outlined on the two filing maps just discussed, Colorado Exhibit 45 and Colorado Exhibit 46, if those extensions are constructed, our guess or opinion is that they might together increase these ex-

portations by about 6000 acre feet per year, making a total in the future after these extensions are built of about 12,000 acre feet annually of exported or transmountain diversion water.

Q. In your opinion are exportations above the figure of 10,000 acre feet possible?

A. I gave that figure as 12,000. The 10,000 figure that you cited would be the average of past diversions plus the estimated future diversions of the proposed extensions. That figure might be better read 12,000, as the estimated future diversion after the proposed extensions are built, and under normal water supply conditions.

In our opinion, no exportations in excess of that amount are possible except if tunnels be constructed through the mountain ranges, or in lieu thereof extensive pump-lifts shall be involved.

I believe also to attain that figure, and certainly to justify any larger scale developments involving tunnels, that replacement storage reservoirs would be necessary.

Mr. GOOD. Mr. Warren, in connection with Exhibit 46, may I ask the same question that I did about Exhibit 45, as to wether there was any supplemental statement or supplemental filing made in connection with this project which has No. 8956?

Mr. WARREN. Would you make the reply to that, Mr. Patterson?

The WITNESS. I believe you will find that there a number of filings at Cameron Pass involving the side of the mountain range on which the Michigan Ditch is located. However, there were

some of those filings that covered extensions of the original Michigan Ditch that since have ripened into decreed rights, and we did not attempt to put those filings in because those rights were submitted in the water right list. This is the only one that I know of that contemplates extending the Michigan Ditch as now constructed beyond the point of its upper point of diversion. I do not believe there have been any filings submitted since the date of this filing.

Mr. GOOD. For the sake of the record, I will state that the statute to which I referred is Chapter 147 of the 1919 Session Laws of Colorado. On page 482 of the 1921 Session Laws, an extension of time is given, providing that the supplemental filing can be made up to 1923. The 1919 Act requires that supplemental filing be made within two years, I believe, of the passage of the Act, and in default of which provides a conclusive presumption of abandonment. I do not know where those are to be found in the current 1935 statutes.

Mr. WARREN. Without assuming to state what rights claimants might have under the filings represented by Colorado Exhibits Nos. 45 and 46, I will state at this point that there may be, and it will probably show at a later date in this hearing, certain facts with reference to the surrounding circumstances that might have afforded these claimants very good reasons for not having pursued their claims further; that they came under the head of "Defeated projects" to which subject we will return at a later date.

The MASTER. Under the head of what, Mr. Warren?

Mr. WARREN. "Defeated projects."

In order to perfect either of these projects, it was necessary to acquire rights of way upon public lands. Just what the rights of those claimants might be if they would now attempt to complete their projects, I do not think any of at this time are competent to forecast.

The MASTER. No work has actually ever been done on either of those extensions beyond the surveys?

The WITNESS. That is my understanding of it.

The MASTER. Do you know whether any rights of way have been acquired?

The WITNESS. They have attempted to acquire rights of way, but were not allowed to.

The MASTER. All of the rights of way would not be over public lands.

The WITNESS. They are all in the national forests, yes.

The MASTER. Do you know of any present plan in regard to the construction of the extension at any time in the near future?

The WITNESS. The projects are both physically and engineeringly and financially feasible. The principal reason at present is not that these ditches can not now acquire rights of way, although that was one reason why they were not built at the time. They could not at that time get the necessary rights of way. One reason today that they are not being pursued more actively is this lawsuit. If there is a determination and they have a right to export some more water, they

undoubtedly will be built, because there is a great need for additional water in the Poudre Valley. It is quite impossible under the cloud of title created by this ligitation to interest anyone in that financing at the present moment.

* * * * *

Q. Are you familiar with the early history of the Jackson County project?

A. Well, to the extent that I know that in its inception it was conceived as a Carey Act project.

Q. Were some steps taken under the Carey Act in the irrigation of those projects?

A. Yes, the lands proposed to be irrigated were included in what is designated as Colorado Withdrawal List No. 39, under the Act of March 15, 1910. This withdrawal list was filed April 2, 1913, and covered 34,209.34 acres of land, described in the list, all of which was located in Jackson County, and a part of which was the land proposed to be irrigated under this Jackson County project.

Q. What action, if any, did the Department of the Interior, United States Land Office, take upon this application?

A. The Department of the Interior, United States Land Office, under date of June 27, 1913, rejected Colorado's application, and in that letter of rejection cited a letter from the director of the U. S. Reclamation Service, bearing the date of May 31, 1913, giving as reasons for rejection: "It, therefore, appears that the water required for this list would seriously diminish the water supply of the North Platte project, which is supplied through Pathfinder Reservoir, and that it is

doubtful if there would be sufficient water even if the North Platte project was not considered."

Q. Did Mr. Meeker make any reference to this in his report to the Attorney General dated May 23, 1922, which is set forth in Colorado Exhibit 60?

A. Yes, he did. On page 4 he stated: "The company finally became disgusted at the treatment accorded, and abandoned the Carey Act phase."

Q. Do you know whether any construction was undertaken under this project?

A. Yes. There is evidence on the ground of the construction of about 25 miles of ditch and lateral systems.

Q. Do you know how much money has actually been expended on the project?

A. The documents, including the Meeker report of 1922, which I have examined, state that $35,000 or more had been expended.

Q. Do you know whether or not the right of way application of the project as afterwards organized, was ever granted?

A. No, I do not.

Q. Have you been able to contact the original applicants?

A. No, I have not. I have tried to, but they are scattered over the country and difficult to contact. I might state, in that connection, that this same project, during the last three years, has been under investigation by the Director or the Commissioner of the Taylor Grazing Act, and at his request I personally made considerable effort to find the people who might have what remaining

rights or claims or interests there are in this Jackson County project. I was not able to contact them, although we did a good deal of work for the Director of the Taylor Grazing Act in the way of field investigations and surveys and furnished a great deal of information about the project to that federal agency.

Mr. STODDARD. May I ask a question?

Mr. WARREN. Yes.

Mr. STODDARD. The Taylor Grazing Act is administered under the Department of the Interior, is it not?

The WITNESS. I am not really sure whether that is an agency under the Department of the Interior or not.

Mr. STODDARD. That is the fact, though.

The WITNESS. I rather believe that that is correct, and I know the individuals, in that connection, having negotiated and worked with them. It was intended by that agency to make a project to demonstrate, on a fairly large scale, the possibility and the advisability of attempting to make their public domain, in charge of the Taylor Grazing Act, more valuable for the purposes of grazing, particularly. This most recent effort in connection with this particular project was intended as a livestock grazing improvement to be constructed with CCC labor, and a CCC camp was installed and some work was done. However, not enough work was done to actually run water through the various ditches. It is my understanding that recently, when the change was made in the head of the Taylor Grazing Division of the Taylor Grazing Act, the project has been

abandoned by that agency and they do not intend to rehabilitate it.

Q. How recently was that CCC camp project initiated, if you know?

A. That was in 1938.

* * * * *

Q. Has the Red Hill Ditch actually been in operation?

A. Yes. It is an old ditch. As far as I know, it has been there a long time. It has recently been enlarged, however; they have put a steam shovel in there and made it a much bigger ditch than it used to be.

Q. Have you seen it in operation?

A. Yes.

Q. When?

A. It was operating last fall.

Q. That was the first time that you had ever seen it in operation, was it not?

A. It was the first time during this period. I don't believe that I ever saw water in that ditch while it was small. Personally, I could not testify to that. But it did run water through in 1939. In 1938, of course, while the steam shovel was working in it, it did not divert any water.

* * * * *

Q. That, in addition to the 1200 acres, would be about 1700 acres of the 131,000 that you listed as irrigated?

A. Yes. I do not want my testimony to be interpreted that that land was never irrigated. All I know about it is that it was irrigated during our three-years' investigation. It was not irrigated the first year. A part of it was the second. All

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that we have shown was irrigated either continuously through those three years or this 1700 acres that you mention is largely the 1939 portion.

Q. In addition to that 1700 acres, there is perhaps another thousand acres or so closer to Lake Creek that was irrigated before 1938 and 1939?

A. You refer to those lands, now, from Lake Creek east and shown in green, and through which there are certain ditches—Hill Ditch No. 1, Hill Ditch No. 2, and so forth?

Q. Yes.

A. Yes; that, I think, is rather older development.

Q. So that there would be approximately 3000 acres in all that solid green area.

A. Yes, that looks like a fair estimate.

Q. And that is irrigated under the 30 second feet through the Independence Ditch from Lake Creek, and the 36 second feet through the Pleasant Valley Ditch from North Fork, plus what local supply there is in Lake Creek?

A. Yes. It is a little mixed up. You say the 30 second feet under the Independence. I assume you are treating that as the limited capacity of that ditch?

Q. Yes.

A. And the 36 second feet under the Pleasant Valley as its decreed right?

Q. Yes.

A. Yes, that is correct.

Q. Do you know what the capacity of the Pleasant Valley is?

A. I think I have some information here on it. (Referring to papers.) The ditch was being en-

larged—the drag line was working on it—in 1938. Its estimated capacity as enlarged was 132 second feet.

Q. What was it before it was enlarged?

A. I don't know. We didn't have any measurements on it. It was not carrying water in the season of 1938. I don't know what its capacity was then.

Q. Under what right did it carry 132 second feet, when Exhibit 35 shows its right to be 36?

A. That would be up to the Court, to determine what its right would be. The probabilities are, in 1939 or 1938, the additional capacity would be the enlargement priority. But that is pure speculation on my part, as to what the Court might do. I don't know any of the circumstances about it.

Q. Do you know how the Colorado State Department is administering that?

A. I don't exactly get the question, Mr. Good. You mean as to its limit of its diversion?

Q. Yes.

A. No, I don't believe I would like to encroach on the other office, concerning which our department is not in any way authorized to work.

Q. You do not know, then, whether any limitations have been imposed on it by the Colorado State Engineer?

A. No.

Q. Was there a measuring flume in the Pleasant Valley Ditch prior to 1937 or 1938?

A. I don't know that I can answer that definitely. As I stated, it was not in use; the ditch was being enlarged and a steam shovel was in operation in the season of 1938, and the enlarge-

ment was expected to be completed in the fall, and I don't know whether there was a measuring device in that ditch or not.

Q. Do you know whether there is now?

A. No, I don't. I might add to that just this one comment: that we were only concerned about measuring devices where they were a part of our studies and not where the devices might be in any way used as a part of the system of administration.

Q. The additional area above 1700 acres which has just been reclaimed in the last year or so is, of course, a part of the development by which they are enlarging the capacity of the Pleasant Valley Ditch, is it not?

A. It would seem to me that they would not be carrying on this extensive remodeling and enlarging of the irrigation system except that they might be trying to put some additional land under irrigation. Now, as to how effective that may be, whether they have the water or have the rights, I haven't tried to concern myself with that.

Q. It is obvious that under the 30 second feet from the Big Creek area through Independence Ditch and the 36 second feet decreed for the Pleasant Valley, the entire area could not be irrigated; isn't that right?

A. Probably not irrigated as well as the owner would like to irrigate it. I would say that that would be a rather small quantity of water—the two decrees you mention—for adequate irrigation.

Q. It would be so inadequate it would be more

desirable to limit the acreage rather than to try to spread it over the entire acreage?

A. I don't know. I don't know whether I am qualified to answer that or not, because this apparently is based on the judgment of somebody else. What I might do under the same circumstances is probably something that would involve a little more about how they fared in the past.

Q. Is October irrigation the normal practice in North Park?

A. No, it is not normally for existing hay meadows; they don't irrigate the meadows in October.

Q. It is very unusual, is it not—very rare?

A. It is, on the river bottoms; I don't believe there is any that goes on there, but there are some of these pasture lands that they irrigate whenever they can, and I think these diversions last year were made in the fall because there was perhaps a little water that could be diverted as part of the use of a new ditch, and so forth, getting ready for complete operations as far as they could this coming season.

Q. The fact that this suit is pending in Colorado hasn't anything to do with that?

A. I doubt it. There is a great need for some additional pasture in that area, and not only the individuals, such as the owner of this place, but the federal government itself, are carrying on a good deal of work of that kind.

* * * * *

Q. That is largely the new area which you testified has been brought in under the recent construction that has recently been made in that

area from the Pleasant Valley Ditch; is that right?

A. No. That is under the Red Hill Ditch, and the testimony that I gave was that that ditch during 1938 and the early part of 1939 was in process of reconstruction and enlargement as to its capacity, and that the first water that I know of, during our three years of investigation, was used, in this area which I believe we estimated at 1200 acres in the sections that you have named, last fall; but that is under the Red Hill Ditch and not directly under the Pleasant Valley.

* * * * *

Q. And so far as you know, nothing further has been done with reference to that provisional decree since the time it was entered? I mean as to the 96 second feet.

A. Well, I wouldn't want to go quite that far, because there have been quite a lot of supplemental actions. I don't know about any legal actions. I am thinking now of physical efforts on the ground to get that Jackson County project, of which this was a part, into operation. Those activities have been conducted or carried on by individuals, by grazing districts, by our Board at various times, and by the director of the Taylor Grazing Act. Now, I am not representing that they have made any additional filings or statements of claim, or done anything in a legal nature, but there have been repeated efforts to get that project into operation from time to time.

Q. Has anything been done of a physical nature to divert and apply to beneficial use that additional 96 second feet of water?

A. The only work of that kind that I know of personally was the work done in the season of 1938 by the CCC Camp, that did some work of rehabilitating the ditch system under the Jackson County project.

Q. But that didn't go to the extent of diverting water and applying it to the land?

A. I understand not.

* * * * *

Q. You know of no present work being done on any one of those projects?

A. Well, now, that might be just as to one or a few of them. There might be this situation, that there was some work going on in connection, for example, with the Jackson County project in the last year or two, and while that work has now stopped and is not going on, it is my understanding that it may be—and that efforts are being made to continue it, so that I am not quite sure. I wouldn't want to say that nothing is going on because there are, for example, grazing districts in that Jackson County area that are functioning and continuing their efforts, but whether they are building anything at this moment, I can not accurately say.

Q. Who is carrying on any work, or who has been carrying on any work in connection with the project? That is shown by Exhibit 62, is it not, the filing on that?

A. That filing is an indication of the project or possibility that is there and has been for a number of years, although it has not been successfully completed or put into full operation. I think work periodically has been done on it, even from the earliest date of its inception. That first work,

as I get it from the records in the files of the state, involved expenditures of around $35,000 and the actual construction of quite a number of miles of ditch which, however, did not reach the state of completion and were not, as far as I can learn, put into actual operation.

Then I know that two years ago some further work of rehabilitation and repair, and to some extent enlargement in places, was carried on under the Civilian Conservation Corps that was established in that area in cooperation with the grazing districts, or some of them, in Jackson County.

Q. Mr. Patterson, isn't it a fact that the filing on that project, which is Exhibit No. 62, was made by the Jackson County Land and Irrigation Company?

A. I think that is the claimant under one of the filings covering the so-called Jackson County project.

Q. Sheet No. 2 of Exhibit No. 62 shows that company to be the claimant, does it not?

A. Yes, that covers Jackson County Land and Irrigation Ditch No. 1.

Q. I am referring particularly to the certificate in the left-hand corner reciting, "Know all men by these presents that the undersigned Jackson County Land and Irrigation Company, claimant"—

A. Yes.

Q. Are you aware of the fact that the Jackson County Land and Irrigation Company was dissolved by action of the proper officials of the State of Colorado on October 25, 1926?

A. No, I did not know that. I know that when the Director of the Taylor Grazing Act was interested in the project, the representatives of grazing districts in Jackson County attempted to locate the present owners of this original project. As to whether they located them or not, I couldn't say. I do not know about this formal action that you have mentioned here at all.

Q. Well, of course, if it should be a fact that the corporation was dissolved in 1926, at least the claimant has not done any work in connection with the project since that time.

A. Not the original claimant, no.

Q. Do you know of anyone who has succeeded to the rights of the original claimant?

Mr. WARREN. Colorado objects upon the ground it is wholly immaterial and irrelevant. This being a suit between the states, and it appearing that a large amount of work has been done toward the completion of this project, so far as this suit is concerned, it is wholly immaterial as to who may own any rights under this particular filing.

Q. You may answer the question.

A. What was the question?

(Last question read.)

A. No, I don't believe that I do. However, may I offer this comment, Mr. Wehrli? In Colorado, as I understand it, anyone may go and build a project at a site upon which a previous claimant may have made a filing. He does not acquire any preference in that regard because our constitution provides that the right of appropriation shall never be denied. The fact that one man made a filing would not deny anyone

else the right of going ahead and building that project.

Q. And in so far as you are concerned, Mr. Patterson, you do not know of anyone that is interested at the present time?

A. Oh, yes, I do. The project as a possibility is very much in the minds of people of Jackson County and the irrigation districts of that county.

Q. That refers to the general public. I mean some particular individual who either owns land that would be irrigated by it, or pasture land that would be irrigated by it, or who would be interested in the capture and conveyance of water for a consideration to others. Do you know of any such person?

Mr. WARREN. Just a moment. May our objection show to this entire line of questioning?

Mr. WEHRLI. Yes.

A. Not other than those livestock people of Jackson County who are interested through their grazing districts, and as individuals, in more irrigated pasture in Jackson County. I mean by that that I do not know of some non-resident of Jackson County who is now putting up any money to build something up there. I do not know that sort of a person. But the people of Jackson County who have livestock interests in that county are directly and indirectly interested in seeing this project carried to a conclusion, if possible.

Q. That is the extent of your knowledge as to anyone being interested in the project at the present time?

A. Yes. I would have to admit that our Board is also interested in it to this extent, that we are required by the Act creating the Board to assist the citizens of the state in organizing and in carrying out what their needs and hopes might be with respect to water development. So we are as a Board very much interested in the project, or in the possibility that is there.

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